779

SUPREME COURT OF THE UNITED STATES.

No. 132.

WILLIAM CUSHING AND AL., OWNERS OF THE BRIG "JAMES GRAY," LIBELLANTS AND APPELLANTS,

vs.

THE OWNERS OF THE SHIP "JOHN FRASER" AND THE OWNERS OF THE SHIP "GENERAL CLINCH."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

INDEX.

	Original.	Print.
Libel	3	1
Answer of steamer Clinch	6	3
Answer of ship J. Frazer	9	6
Evidence for libellants	12–27, 46	9, 40
Do. for Gen'l Clinch	27	22
Do. for ship J. Fraser	30	25
Opinion of district court	47	40
Appeal to circuit court as to ship J. Fraser	61	52
Appeal to circuit court as to steamer General Clinch	63	54
Proceedings and testimony taken in circuit court	65	54
Decree of circuit court	78	60
Appeal bond	82	71
Certificate of clerk	84	72
Petition of appeal to supreme court	85	73
Citation and service	87	74
Citation and service	88	74

GIDEON, print.

UNITED STATES OF AMERICA,
South Carolina District.

In Admiralty.

To the Hon. R. B. Gilchrist, Judge of the United States District Court, holding admiralty jurisdiction in and for the District of South Carolina:

The libel and complaint of William Cushing, John N. Cushing, and Caleb Cushing, of Newburyport, in the State of Massachusetts, owners of the brig James Gray, whereof Charles H. Plumer is master, her tackle, apparel, and furniture, against the ship John Fraser, whereof Thomas R. Hubert is master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein; and also against the steamer General Clinch, whereof Charles R. Granthum is master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, a cause of collision, civil and maritime; and thereupon the said William, John N., and Caleb Cushing, articulately propound as follows: That the said brig James Gray, whereof Charles H. Plumer then was and now is master, at the beginning of the present month of February was at the port of Charleston, in the district of South Carolina, destined on a voyage to Antwerp, with a full cargo of paddy, cotton, and other goods, to the value of dollars, or thereabouts; and was at that time a tight, staunch, and well-built vessel of the burthen of three hundred tons or thereabouts, and was then completely rigged and sufficiently provided with tackle, apparel, and furniture, and then had on board and in her service mariners or thereabouts, which was a full complement of hands to navigate the said ship on the voyage above mentioned.

2. That on the 1st of February, 1856, the said brig left the dock at which she had taken in her cargo at Charleston, and in the prosecution of her voyage was hauled out into the stream of Cooper river, or the harbor of Charleston, and anchored on the opposite side of the said river as far as she could safely go, and more than one hundred fathoms from any of the docks or wharves of Charleston, and was there safely at anchor; that she remained there waiting for the proper arrangements, and a favorable opportunity to sail, until the evening of the 5th February; that as soon as it was dark on that evening, say about half-past six o'clock, a light in a large bowsprit lantern was put up in the rigging of the said brig, hung up with an ear-ring on the port foreswiftsure, and that the light therein was distinctly visible, and remained so at the happening of the collision hereinafter mentioned; that about seven o'clock on the

UNITED STATES OF AMERICA,
South Carolina District.

In Admiralty.

To the Hon. R. B. Gilchrist, Judge of the United States District Court, holding admiralty jurisdiction in and for the District of South Carolina:

The libel and complaint of William Cushing, John N. Cushing, and Caleb Cushing, of Newburyport, in the State of Massachusetts, owners of the brig James Gray, whereof Charles H. Plumer is master, her tackle, apparel, and furniture, against the ship John Fraser, whereof Thomas R. Hubert is master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein; and also against the steamer General Clinch, whereof Charles R. Granthum is master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, a cause of collision, civil and maritime; and thereupon the said William, John N., and Caleb Cushing, articulately propound as follows: That the said brig James Gray, whereof Charles H. Plumer then was and now is master, at the beginning of the present month of February was at the port of Charleston, in the district of South Carolina, destined on a voyage to Antwerp, with a full cargo of paddy, cotton, and other goods, to the value of dollars, or thereabouts; and was at that time a tight, staunch, and well-built vessel of the burthen of three hundred tons or thereabouts, and was then completely rigged and sufficiently provided with tackle, apparel, and furniture, and then had on board and in her service mariners or thereabouts, which was a full complement of hands to navigate the said ship on the voyage above mentioned.

2. That on the 1st of February, 1856, the said brig left the dock at which she had taken in her cargo at Charleston, and in the prosecution of her voyage was hauled out into the stream of Cooper river, or the harbor of Charleston, and anchored on the opposite side of the said river as far as she could safely go, and more than one hundred fathoms from any of the docks or wharves of Charleston, and was there safely at anchor; that she remained there waiting for the proper arrangements, and a favorable opportunity to sail, until the evening of the 5th February; that as soon as it was dark on that evening, say about half-past six o'clock, a light in a large bowsprit lantern was put up in the rigging of the said brig, hung up with an ear-ring on the port foreswiftsure, and that the light therein was distinctly visible, and remained so at the happening of the collision hereinafter mentioned; that about seven o'clock on the

same evening of 5th February aforesaid, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this honorable court, the said brig being at her anchorage as aforesaid, Lewis McNorton, second mate of said brig, who then had the forward watch, observed a ship, which was afterwards discovered to be the John Fraser, in tow of a steamer, which was afterwards discovered to be the General Clinch, coming up the river with great headway towards the said brig, and that thereupon he and other mariners on board the said brig shouted to the said steamer and ship to keep clear, which they might easily have done if they had been sufficiently careful, and that notwithstanding the brig James Gray was at anchor, and could not possibly get out of their way, and notwithstanding the light which was duly suspended upon the forward rigging of the said brig as aforesaid, according to the usual custom of the port of Charleston, and was distinctly visible, and notwithstanding there was room sufficient for the said ship and steamer to pass, the crew kept on their course with the steam and tide, and ran the said ship John Fraser across the bows of the said brig James Gray, and while so crossing with very great force and violence, ran foul and on board of said brig, carrying away her jib-boom, bowsprit, and cut-water, also her forward and fore rigging, and tearing up her plank sheer and covering board, and at the same time carrying her adrift towards a bank that lay astern of her; that for the preservation of the brig and cargo they let go her second anchor, and that after doing much damage to the brig, the said ship dragged clear and kept on her way, without any inquiry or offer of assistance to the brig, which she had so seriously injured. That the crew forthwith tried the pumps and pumped out the brig, and at 10 o'clock p. m. sounded them, and found that she was making water at the rate of eight inches in three hours; that the next day they got help from the shore, and procured a steamer to carry the brig back to the wharf of the city of Charleston, when she was obliged to discharge a part of her cargo, and to be placed in the hands of a shipwright to repair the damage.

3. That at the time the damage mentioned in the next preceding article happened, it was impossible for the brig James Gray to get out of the way of the said ship John Fraser, by reason that the former was at anchor, with a flood tide running; that there was room enough for the said ship John Fraser, and the steamer towing her, to steer clear of and pass by the said brig, without doing any damage whatever; that besides the master and crew of the ship John Fraser (there was on board of her a branch pilot named Charles E. Lee, who at the time was engaged with them in the direction and management of the said ship; and besides the master and crew of the steamer General Clinch, there was also on board of her a branch pilot engaged in the management of her, whose name is John Carnigham, and that if the said master, pilot, and

crew) had kept a proper lookout, and had not neglected to keep clear of the said brig as they might well have done, if they had faithfully discharged their several and respective duties, the aforesaid damage would not have happened.

4. That the said brig James Gray, before and at the time of receiving the damage from the ship John Fraser above mentioned, was a tight, strong, and staunch vessel; and that the libellants then were, and now are, the true and lawful owners of the same, and of her tackle, apparel, and furniture.

5. That the libellants have incurred heavy expenses in the unloading of the cargo of the said brig, and in the charges incident thereto; also in the repairs and refitting the damage to the hull and rigging of the brig, and in the delay of her voyage, seamen's wages, and incidental expenses. That the said repairs are not yet completed, and cannot be exactly stated, but they will amount to three thousand ($3,000) dollars, or thereabouts; and that the other expenses are estimated at about twenty-five hundred ($2,500) dollars; and that all these damages have been incurred by reason of the said brig having been run down by the said ship John Fraser.

6. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court, in verification whereof, if denied, the libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

Wherefore the libellants pray that process in due form of law, according to the course of courts of admiralty, and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said ship John Fraser, and the said steamer General Clinch, their tackle, apparel, and furniture; and that all persons having, or pretending to have any right, title, or interest in the said ship and steamer, may be cited to appear and answer, upon oath, all and singular the matters so articulately propounded; and that this honorable court would be pleased to pronounce for the damages aforesaid, and to decree such other relief to the libellants as shall to law and justice appertain; also to condemn the said ship and steamer, their tackle, apparel, and furniture, and all persons intervening for their interest therein, in costs.

CHAS. H. PLUMER.

Sworn to before me, this 29th Feb'y, 1856.

WM. JERVEY, *Magistrate.*

UNITED STATES OF AMERICA,
South Carolina District.

In Admiralty.

The answer of Alexander Robert sonand Preston West, executors of John Magee, deceased, lately at the time of his death owner

and claimant of the steamer General Clinch, to the libel and complaint of William Cushing, John N. Cushing, and Caleb Cushing, owners of the brig James Gray, against the said steamer.

And now come Alexander Robertson and Preston West, executors of John Magee as aforesaid, owner of the said steamer General Clinch, and for answer to the libel of William Cushing, John N. Cushing, and Caleb Cushing, against the said steamer, do allege and propound as follows, that is to say:

First. That the said John Magee was, when the said libel and complaint was propounded, the true and bona fide owner of the said steamer General Clinch, and that no other person was the owner thereof; and that they, the said Alexander Robertson and Preston West, are the executors of the last will and testament of the said John Magee, now deceased.

Second. That these respondents know nothing of the state and condition of the brig James Gray and her cargo, nor of the number and fitness of her crew and equipage, nor the seaworthiness of the said vessel; and therefore can neither admit nor deny all or any of the several allegations and averments articulated and propounded in the first article of the said libel.

Third. That the respondents do not know at what time the said brig left the wharf or dock at which she had taken in her cargo, and came to anchor opposite, or at what distance precisely she came to anchor, but are informed, and believe, that at the time of the collision between the said brig and ship John Fraser, propounded in the libellants' said libel, the said brig James Gray was not anchored and moored in conformity to the laws and port regulations of the city of Charleston, requiring vessels remaining in the stream a certain length of time to be properly anchored and moored, and the said brig was only anchored.

Fourth. That for answer to so much as is alleged and propounded in the article of the said libel, as to a collision between the said brig James Gray and the ship John Fraser and steamer General Clinch, these respondents, upon information derived from others, articulate and propound as follows, that is to say: the said Captain John Magee, owner of the said steamer General Clinch, in his lifetime, on the day stated in the libel, to wit, the fifth day of February last, or shortly before, contracted to hire the said steamer General Clinch, her equipage and crew, to tow in the ship John Fraser, then outside of the bar. That John Carnighan, a full branch pilot of the harbor of Charleston, with the agreement and consent of the said John Magee, went on board of the steamer to guide and direct her in towing the said ship; and C. R. Granther, then master of the said steamer, being sick, the said steamer was entirely under the control and management of the said Carnighan. That according to the laws, regulations, and usage of the port of Charleston, the pilots to whom the duty is intrusted of

conducting a vessel over the bar, have for that purpose, while on board, the absolute and exclusive control and direction, and are alone to govern and order what is to be done. That on the day in question the said steamer had, under the orders of the said Carnighan, for the purpose of the said towage, tackled the said ship John Fraser about two miles north of the bar, there being then on board of the said ship, as pilot, Charles Lee, a full branch pilot of the city and harbor of Charleston. That the said steamer then towed up the ship John Fraser slowly, and brought her safely over the bar, passing through South channel by quarantine buoy. That when nearly abreast of Castle Pinckney, opposite the city, the pilot Carnighan gave orders from the steamer to the ship to stand by to haul in her hawser, the distance between the ship and steamer being then about fifty fathoms, and at the same time the steamer was slowed to prevent her coming up too fast. That this order was acknowledged from the ship, the steamer being then between quarantine buoy and the Castle. That very soon after Captain Herbest, on board of the ship, came forward and sung out to carry him up to town, and turn him round, which pilot Carnighan declined to do, because it was night, and he could not see sufficiently well. That when about abreast of Adger's wharf, in the city of Charleston, the hawser was let go on board of the steamer by order of the pilot Carnighan, and directions given to the ship to haul in the hawser, and the course of the steamer was then changed, and she headed in for the wharves of the city. That Captain Herbest, from on board of the ship John Fraser, sung out to the steamer to hold on to the hawser, but he was answered that it was all gone. That then, for the first time, the pilot Carnighan preceived the brig James Gray, which had not been previously observed, in consequence of her having no light in the rigging, as required by law. That upon perceiving the brig James Gray, pilot Carnighan asked the pilot on board of the ship if he saw the brig, to which he replied that he did, and was going off shore of her; and pilot Carnighan rejoined to the pilot on board the ship, that he had better port his helm. That by this the steamer was heading in for the wharves, and the ship had come up nearly abreast of the steamer. That when pilot Carnighan sung out to the ship as to porting her helm, Captain Herbest, of the ship John Fraser, ordered his helm hard a starboard, immediately after which the ship crossed the bows of the brig, and carried away a portion of her forward works. There was no collision between the steamer and the brig, nor was any damage or injury done to the brig by the steamer.

Fifth. That as to so much of the said libel as propounds that if the master and crews of the said ship John Fraser and the steamer General Clinch had kept a proper look-out, and had discharged their duties, the said damage would not have happened. These respondents allege and propound that the pilot on board the said steamer,

and claimant of the steamer General Clinch, to the libel and complaint of William Cushing, John N. Cushing, and Caleb Cushing, owners of the brig James Gray, against the said steamer.

And now come Alexander Robertson and Preston West, executors of John Magee as aforesaid, owner of the said steamer General Clinch, and for answer to the libel of William Cushing, John N. Cushing, and Caleb Cushing, against the said steamer, do allege and propound as follows, that is to say:

First. That the said John Magee was, when the said libel and complaint was propounded, the true and bona fide owner of the said steamer General Clinch, and that no other person was the owner thereof; and that they, the said Alexander Robertson and Preston West, are the executors of the last will and testament of the said John Magee, now deceased.

Second. That these respondents know nothing of the state and condition of the brig James Gray and her cargo, nor of the number and fitness of her crew and equipage, nor the seaworthiness of the said vessel; and therefore can neither admit nor deny all or any of the several allegations and averments articulated and propounded in the first article of the said libel.

Third. That the respondents do not know at what time the said brig left the wharf or dock at which she had taken in her cargo, and came to anchor opposite, or at what distance precisely she came to anchor, but are informed, and believe, that at the time of the collision between the said brig and ship John Fraser, propounded in the libellants' said libel, the said brig James Gray was not anchored and moored in conformity to the laws and port regulations of the city of Charleston, requiring vessels remaining in the stream a certain length of time to be properly anchored and moored, and the said brig was only anchored.

Fourth. That for answer to so much as is alleged and propounded in the article of the said libel, as to a collision between the said brig James Gray and the ship John Fraser and steamer General Clinch, these respondents, upon information derived from others, articulate and propound as follows, that is to say: the said Captain John Magee, owner of the said steamer General Clinch, in his lifetime, on the day stated in the libel, to wit, the fifth day of February last, or shortly before, contracted to hire the said steamer General Clinch, her equipage and crew, to tow in the ship John Fraser, then outside of the bar. That John Carnighan, a full branch pilot of the harbor of Charleston, with the agreement and consent of the said John Magee, went on board of the steamer to guide and direct her in towing the said ship; and C. R. Granther, then master of the said steamer, being sick, the said steamer was entirely under the control and management of the said Carnighan. That according to the laws, regulations, and usage of the port of Charleston, the pilots to whom the duty is intrusted of

conducting a vessel over the bar, have for that purpose, while on board, the absolute and exclusive control and direction, and are alone to govern and order what is to be done. That on the day in question the said steamer had, under the orders of the said Carnighan, for the purpose of the said towage, tackled the said ship John Fraser about two miles north of the bar, there being then on board of the said ship, as pilot, Charles Lee, a full branch pilot of the city and harbor of Charleston. That the said steamer then towed up the ship John Fraser slowly, and brought her safely over the bar, passing through South channel by quarantine buoy. That when nearly abreast of Castle Pinckney, opposite the city, the pilot Carnighan gave orders from the steamer to the ship to stand by to haul in her hawser, the distance between the ship and steamer being then about fifty fathoms, and at the same time the steamer was slowed to prevent her coming up too fast. That this order was acknowledged from the ship, the steamer being then between quarantine buoy and the Castle. That very soon after Captain Herbest, on board of the ship, came forward and sung out to carry him up to town, and turn him round, which pilot Carnighan declined to do, because it was night, and he could not see sufficiently well. That when about abreast of Adger's wharf, in the city of Charleston, the hawser was let go on board of the steamer by order of the pilot Carnighan, and directions given to the ship to haul in the hawser, and the course of the steamer was then changed, and she headed in for the wharves of the city. That Captain Herbest, from on board of the ship John Fraser, sung out to the steamer to hold on to the hawser, but he was answered that it was all gone. That then, for the first time, the pilot Carnighan preceived the brig James Gray, which had not been previously observed, in consequence of her having no light in the rigging, as required by law. That upon perceiving the brig James Gray, pilot Carnighan asked the pilot on board of the ship if he saw the brig, to which he replied that he did, and was going off shore of her; and pilot Carnighan rejoined to the pilot on board the ship, that he had better port his helm. That by this the steamer was heading in for the wharves, and the ship had come up nearly abreast of the steamer. That when pilot Carnighan sung out to the ship as to porting her helm, Captain Herbest, of the ship John Fraser, ordered his helm hard a starboard, immediately after which the ship crossed the bows of the brig, and carried away a portion of her forward works. There was no collision between the steamer and the brig, nor was any damage or injury done to the brig by the steamer.

Fifth. That as to so much of the said libel as propounds that if the master and crews of the said ship John Fraser and the steamer General Clinch had kept a proper look-out, and had discharged their duties, the said damage would not have happened. These respondents allege and propound that the pilot on board the said steamer,

and the crew of the same, did keep a proper look-out, and did properly discharge their duties, and that the said damage was not caused by any neglect on their part.

Sixth. That as to so much of the said libel as propounds as to the condition of the brig James Gray at the time of the collision, or the injury done to her thereby, these respondents allege and propound that they know nothing of and concerning the same. And these respondents say, that no decree can be made in the premises against the steamer General Clinch, her tackle, apparel, and furniture, for the damage done to the James Gray in the collision.

Because the same was caused by improper neglect on the part of the James Gray, in not having a proper light in her rigging, according to the laws and regulations of the port and harbor of Charleston, and not by any neglect or default on the part of the steamer General Clinch.

Because the said collision, if owing to any other cause than the neglect of the master and crew of the said James Gray, was owing to the master and crew of the ship John Fraser, which alone can be condemned for the same.

And because there was no collision between the steamer and the brig James Gray, nor was any injury actually done by the former to the latter, and therefore no decree can be made therefor in proceedings in rem in this court against the said steamer.

Wherefore these respondents pray that this honorable court will be pleased to pronounce against the libel aforesaid, as against the said steamer, and condemn the libellants in costs, and otherwise right and justice to administer in the premises.

ALEXANDER ROBERTSON.
PRESTON WEST.

NELSON MITCHELL,
Proctor for Respondents.

Personally appeared Alexander Robertson, one of the aforesaid respondents, who on oath saith, that so much of this answer as comes within his knowledge is correct and true, and the rest he believes to be so.

Sworn to before me, this 19th day of Nov'r, 1856.

A. W. BLACK, *Notary Public.*

UNITED STATES OF AMERICA,
South Carolina District.

In Admiralty.

To the honorable R. B. Gilchrist, Judge of the United States for South Carolina District.

The answer of Thomas R. Herbest, master of the ship John Fraser, to the libel of the owners of the brig James Gray, propounded through Charles H. Plumer, master of said brig.

And now comes Thomas R. Herbest, master of the said ship John Fraser, and for answer to the libel against said ship, doth allege and propound as follows, to wit:

1st. That as to the matters contained in the first article of the said libel, the same are therein, in great part, falsely and untruly alleged and pleaded, for the truth and fact was, and is, and this respondent doth allege and propound, that the said hands to navigate the said brig were not on board at the time of the alleged collision, to render the necessary assistance under the circumstances, as this respondent has been informed, and verily believes. As to the said brig being staunch, and otherwise well furnished in tackle and apparel, this respondent does not sufficiently well know her condition either to admit or deny.

To the 2d article contained in the libel, this respondent doth further allege and propound, that the ship John Fraser, on Tuesday, the 5th day of February, 1856, about 4 o'clock p. m., the tide well serving, was towed from the bar of Charleston to the city by the steamer General Clinch, the said ship being under the charge of Charles Lee, a licensed pilot for the port, and the steamer piloted and commanded by John Carnighan, also a licensed pilot for the port of Charleston. That about 7 o'clock p. m. encountered, whilst she was lying at anchor, the brig James Gray. This respondent alleges and propounds, that the said ship John Fraser was towed into the harbor of Charleston by the steamer General Clinch; that in proceeding up to the harbor she passed several vessels, all of which displayed lights, which were distinctly visible to this respondent, as well as the lights in the city. That on nearing his contemplated place of anchorage off Fraser's wharf, he desired the pilot of his ship to drop the vessel as near Fraser's wharf as he could reasonably and safely do; whereupon the said pilot, standing aft, requested respondent to hail the steamer, and express his wish to them. Respondent went forward and found the mate and second mate, and most of the crew, standing on and about the topgallant forecastle, ready to haul on board the hawser, when the towage was ended. Respondent hailed the steamer, as directed by his pilot, and expressed his wish to anchor off Fraser's wharf. The pilot of the steamer Clinch, as this respondent verily believes, answered, "I think then we have headway enough now," or words to that effect; whereupon respondent further said, "round the ship head up the current," so that she would lie properly at her anchorage; when he was again answered by the pilot of the steamer, "I cannot do it;" or "there is not room enough;" or words of similar import. On receiving this answer, respondent did not again repeat his wish, but said, "do not cast off my hawsers, as they will get foul of my anchors, but back up and we will haul in the slack of the hawsers;" whilst in the act of so communicating, the steamer came so near the said brig James Gray, as first to discover her ly-

ing at anchor, and displaying no light whatever. A light was seen in the rigging some time after the collision, and this deponent has been informed, and believes, that it was suspended after the accident; and this respondent re-avers that it was not there either previous, or at the time of the collision aforesaid. As soon as the brig was seen by those on the steamer, some one on board, addressing the pilot of the ship, said, "do you see that vessel, Charles? our hawsers are gone—port your helm." At this time the ship was under good headway, and this respondent for the first time saw the said brig, and was then almost aboard. Respondent immediately ordered the wheel hard starboard, with the hope of rounding to the ship, but the ship and brig were so nigh each other as to render a collision inevitable; and the starboard swiftsure of the ship being about midships, caught the jim-boom end of the brig and carried it away, and may have effected other damage of greater extent. This respondent further alleges and propounds, that as said ship John Fraser was passing the bow of the brig, and before the actual collision, this respondent loudly, and in the hearing of most if not all of his crew, said, "that fellow has no light." This respondent further alleges and propounds, that a short time after the occurrence, and whilst his ship was coming to her anchors, the boarding officer of the news offices came on board; and on being asked by this respondent whether the safety of the brig was endangered, or whether she needed immediate assistance, was informed that the damage was not so material as to require it, and this respondent proceeded to moor and provide for his own ship.

This respondent further answering, alleges and propounds, to the 3d article contained in libellant's complaint, that before and at the time of the collision, this respondent, with most of his crew, were, as before stated, on and about the topgallant forecastle of the said ship, and therefore in the best possible position, either to discover or avoid any obstacle in their course; and that this deponent heard no other hail or caution than that given by the pilot of the steamer, simultaneous with the notice that his hawsers had been cast off.

In answer to the 4th and 5th articles contained in libellant's complaint, this respondent says, that he has no knowledge, direct or indirect, with respect thereto.

This respondent alleges that all and singular the premises are true; whereupon this respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and condemn the libellant in costs, and otherwise right and justice to administer in the premises.

THOS. R. HERBEST.

BROWN & PORTER,
Proctors.

Personally appeared Thomas R. Herbest, and made oath, that such of the facts contained in the foregoing answer as come within his own knowledge are correct and true, and such as are derived from the information of others he believes to be correct and true.

Sworn to before me, this 11th day of March, 1856.

V. J. TOBIAS,
Not. Pub. and Ex. Offi. Mag.

Evidence taken before Commissioner.

FRIDAY, *7th March*, 1856.

Present: Messrs. Jervey & Wilkinson, for libellants; Mr. Brown, for ship John Fraser; and Mr. Mitchell, for steamer General Clinch.

THE OWNERS OF BRIG JAMES GRAY
vs.
SHIP JOHN FRASER AND STEAMER GEN. CLINCH.

For Libellants.

John Watson, sworn. Is 1st mate of the ship Royal Victoria. On the night of the 5th Feb'y he was aboard of his ship at Atlantic wharf; the brig James Gray was in sight; she bore about east by north of us; he was walking the deck about 6½ o'clock, and saw a light in the port (left) side of the fore rigging—it was no later than 6½ o'clock, and before the John Fraser came in; he was walking deck with the 2d mate, when the latter remarked how very strict the James Gray was with her lights, for when we lay in the stream we neglected it very much; at this time he saw the ship John Fraser towing up, and he went below, and about 20 minutes after 7 the John Fraser was then just clear or past the James Gray; he then saw the light still in the fore rigging, in the same place aboard the ship it was before, and another forward on deck; they were about 180 fathoms from the James Gray; the night was not very dark, but cloudy; the light was bright; could not have passed unobserved; it was the average size of signal lights.

Cross-examined. There were no other vessels in the stream that night; noticed that brig previous to the 5th Feb'y; saw her lights on those occasions; saw her on the 3d and 4th February—she then had a light suspended on the port side of the fore rigging; the tide in the evening of collision was flood; the starboard side of the James Gray would be towards the wharf; when he saw the J. Fraser, she had not rounded the fort—was steering westward; was not on deck when she rounded the fort; he went below some 20 or 30 minutes before 7 o'clock; came back some 20 minutes after 7; did not hear of the collision till next morning, when he came on deck; the John Fraser was to the north of the brig, but could see no

opening between the two at that time; does not know where the steamer was; don't think the John Fraser was 10 fathoms north of the brig; he washed himself in the cabin, came back, and went right to the poop, and there saw the vessels as he has stated. Knows that the brig was lying there 2 or 3 days, if not more; thinks she lay with one anchor, 180 fathoms from the wharf head, tide ebb or flood; the width from the wharf to the neck of the shoal opposite is about half a mile; at that time he could see the rigging of the Fraser; did not notice whether she had any sails set; she had not yet come to anchor; can't say whether the Fraser passed to the starboard or larboard side of the brig; heard some talking aboard the ship and the brig; don't know what they said; knows the captain of James Gray by sight; never had any conversation with him till yesterday. Witness did not come here to prove the collision; he didn't see it; he came here to prove the lights; the voices were singing out so loud, he knew they must have been in both brig and ship. Don't know when the steamer left the ship; the steamer sometimes lets go 4 or 5 minutes before the ship comes to anchor; the hawser, in towing, is usually 50 or 60 fathoms long; don't think the talking would be so loud between the ship and the steamer just letting go the hawser, as there was at that time; the light was elevated about 10 or 12 feet above the rail.

In reply. In the position he was in, he could see the light on the port side of the brig's rigging; witness's vessel was lying east and west, and he was on the poop; he could see the hulls of both the vessels; witness is a stranger to the harbor; don't know the shoals, and when he said the river was half of a mile in width, it was only a supposition; when he came on deck, though he didn't see the collision, he knew there had been one, but heard no particulars about it till next day.

JOHN WATSON.

Sworn to 7th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

George Reeves, sworn. Is sailmaker aboard of the Royal Victoria. Was walking the deck the night of 5th Feb'y, about 7 o'clock; a brig, he believes the James Gray, was lying in the stream off our starboard quarter; he saw a light in her larboard fore rigging, and said that was more than we had, when we were in the stream; it seemed to be a brilliant light, a signal lantern; witness went below just before 7, and left the light still there; he thinks he didn't hear there was a collision till next morning; he didn't see the brig after he turned in that night; the whole hull of the James Gray was visible—could see her plain.

Cross-examined. The brig was lying about 200 fathoms from the wharf-head, at Atlantic wharf; he was sitting about midships; no

vessel was astern of us; it was a fine night—the stars were out; the light was on the larboard shrouds, about half way up; didn't see the John Fraser; can't say that he ever observed the brig lying in the stream before the afternoon of that day; saw no other vessels in the stream.

GEORGE REEVES.

Sworn to 7th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Robert Ash, 2d mate of ship Royal Victoria, sworn. Was on the ship's quarter-deck about 6½ o'clock; saw the brig James Gray lying east by north of us in the stream; we were at Atlantic wharf; was walking the deck with the chief mate; said to him, "that brig is very particular with her lights, which we were not, when we were in the stream;" some 4, 5, or 6 nights he had made the remark to the mate before; he saw the light in the port fore rigging; supposed it to be a signal lantern; about half way up the fore rigging, the usual place where it is put in our country; this was about 6½ o'clock; about ¼ before 7 he went down to wash; the light was still there; about 7½ o'clock he came back on deck; he saw the light still there, in the same part of the rigging; he did not see the collision; observed, when he came up, that the brig's bowsprit was gone, and her jib-boom; it was about half flood; the James Gray lay about 170 or 180 fathoms from us; it was a rather hazy night, but could see the hull of the James Gray plainly.

Cross-examined by Mr. Brown. The brig, as far as his knowledge goes, lay in the same position after the collision as before, but she was clear from the John Fraser when he came up; the ship was just astern of the brig; didn't see the ship come to anchor; when he came aboard his vessel about 11 o'clock, the brig was still in the same place, but swung round, and riding ebb; he could see that the bowsprit of the James Gray was gone, and laid on the starboard bow; carrying away the bowsprit must carry also the jib-boom gear, the fore stays, bobstays, and the cutwater; he saw the bowsprit was carried away, but can't say what other damage was done; could not see the steamboat; is certain he saw the light after the collision; saw it there several evenings previous; never saw a ship carrying lights in the rigging while at sea, except men of war; has seen lights in vessels before in Charleston hung in the fore rigging; if he had been officer of the brig, (in England,) he would have put the light where it was then hung, in the port fore rigging.

In reply. The lantern might still remain in the fore rigging, and yet the bowsprit be carried away; witness says that he can swear as to the exact place the brig lay when he returned aboard the ship; he only came here to swear about the light; as far as he could

judge, the brig lay in nearly the same place as before the collision; if the fore rigging were carried away, the lamp would be swung out of its position.

ROBERT ASH.

Sworn to 7th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

TUESDAY, *March 11th*, 1856.

George W. Brown, sworn. Is a seafaring man, not attached now to any vessel. On the 5th February, just after dark, he was at the head of Atlantic wharf; observed Captain Plumer's light on the port side of the fore rigging, aboard the James Gray; she was lying east by north, at anchor in the stream; his attention was drawn to the brig, because there was a man to go on board, who had been making a disturbance; saw the light all the time he was on the wharf, i. e. about 10 minutes; it was a very bright light; the mate that was in company with him remarked that it was a bright light; it was a pretty dark night; could just distinguish the brig; could not see the hull; could see the mast and rigging; could tell whether it was a brig or a ship.

Cross-examined. Has been going to sea about 8 years; he was on the 5th February a seaman on board the schooner Samuel Lewis; he left the schooner last Tuesday; she has gone to Boston; he did not quit on good terms; he knew nothing about the sailor they were putting on board; he saw Captain Plumer come ashore before dark; the light was in the port side of the lower rigging; it might be about 15 feet; the boat with the man had left the wharf before he got down to the wharf; don't know whether the light remained there all night; supposes the light was put there to prevent vessels running into her; he does not know whether the port side was the proper side to have the light, or the starboard side; has had no conversation with Captain Plumer; he told Captain Plumer he had seen the light; has been doing nothing since he left the Samuel Lewis; he was aboard the Samuel Lewis about two months; shipped for $20 per month; got over $20 when he shipped, and when he left got $30; he and the owner did not agree; the owner, Mr. Wade, of Boston, was here; the schooner was about 100 tons; the schooner arrived here the 27th of January; could have left then if he chosed; he pays his own expenses here; Captain Plumer gives him nothing; had noticed the brig there some 3 or 4 days before the 5th; never observed the light aboard before that day; saw her next morning a little distance from the place she had been—may be she had dragged a length or half a length of her; saw that her bowsprit was carried away; didn't see whether her fore rigging was carried away; the ship Royal Victoria was then at Atlantic wharf; the ship Sea Lion was astern of him at the wharf; has

been staying at the Commercial House since he left the brig; don't know who keeps it; pays $4 per week; there are a few boarders there.

In reply. He is no accountant; keeps no account of what he has received; his wages commenced on the 1st January; he left the schooner the 4th March; his attention had never been drawn particularly to the brig before that night.

GEORGE W. BROWN.

Sworn to 11th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

TUESDAY, 18*th March*, 1856.

Joseph E. Wright, sworn. Is 1st mate, and was on the 5th February, of the brig James Gray, at time of the collision; about 9½ o'clock saw a ship coming up, being towed by a steamer; was on deck; at first saw her below the fort, Sumpter, half an hour before the collision; she was about that place when he went below to tea; had been below about 20 or 25 minutes when he heard his 2d mate hailing something; he then went on deck; saw the steamboat on our larboard bow, about 20 yards off; she was steering about N. N. west, which would have crossed our bows, just clear of us; heard a voice from the steamer call to the ship to haul in the hawser; heard the same voice also hail the ship to put her helm a-port; heard no reply from the ship at all; soon after, a few seconds after, the ship run into us; didn't notice the steamer, they were so busy with the collision; the whole forward rigging was all carried away; bowsprit, cutter, jib-boom, plank sheer split, night-head sprung, cat-heads and bulwarks carried away; on the port side it was worse; the ship and steamer were probably going about 8 or 9 knots; it was a pleasant night, light breeze; could see vessels at the wharf; could not distinguish one rig from another; could see a vessel approaching a hundred yards off, farther than from this office to the Hibernian Hall; a light was set in our brig by one of the boys on board; the order was given to set it by the 2d mate, when he went down to tea; it was not set yet when he went down; didn't see the boy move to execute the order; a lantern produced in evidence, which he testifies is used expressly for a signal light in that vessel; when he came up saw the light; this was before the collision; it was hung to the fore swiftsure; nothing happened to the light at the collision, to his knowledge; took no notice of it after the collision; he had another light, a globe lantern, at the time of the collision, on deck, standing by the mainmast; after the collision he used the lamp at the bow to observe what damage was done; the signal light was out of the way of the injury, but was liable to a great jar, for the shock turned the brig on her broadside twice; the

2d mate had no particular duty on deck at the time he was below; the 2d mate went down to tea with witness, but came up before him, and the men had also gone below to tea when they went; the captain was on shore looking after some men. The James Gray was lying with her head down the stream; tide about ¾ flood, running pretty strong; the brig was lying some 500 or 600 yards to the northward of Castle Pinckney; when he came into the harbor, the vessel he was in turned considerably to the south of Castle Pinckney, before coming up the river; he was aboard the James Gray the night before; the lamp was set, and was set every night they lay in the stream; they lay probably 50 yards from the mud flat at low water, i. e. to the eastward; thinks they were 150 or 180 yards from the wharves; is certain she lay more than two-thirds of the way from the city to the beach or mud flat opposite just before the collision; did not observe the ship, only the steamer; didn't know out of which bow of the ship the hawser ran; when they struck, the brig's anchor started, and she drifted some; received no offer of help from the steamer or ship; the John Fraser anchored about half way between the brig and town, a little to the north of us; when she got disengaged from the ship, we got a second anchor out; he went ashore next day to get assistance to clear the wreck; that same night he went ashore after the captain, and found him coming to the brig; about ten minutes after the collision he, witness, gave orders to try the pumps; she then was making no water; about 10 o'clock tried the pumps again; she had made about 8 inches in 3 hours; next day employed a steamer, which towed us in to a wharf; we discharged a part of our cargo, and commenced repairing; they did not go into the dry dock; hauled up close to the ship yard; at the time of the collision, there was room for the John Fraser to have passed eastward of the James Gray, between her and the shore.

Cross-examined by Mr. Brown. He shipped on the 8th Jan'y, in the brig; she hauled into the stream on the 1st February; the collision was on the 5th February; she was anchored, and not moored; the crew was not full on the 5th February—they were wanting 5 hands; their complement is 8, all told, forward; when he saw the steamer 20 yards off, she was on our port or larboard bow; had not then passed the brig; did not see the ship at that time; the steamer was right abreast of our brig when the order was given to haul in the hawser, and a few seconds after came the collision; if the ship had ported her helm then, her head would have turned to the eastward; the ship must have been about 60 fathoms from the steamer at the time of the order to haul in the hawser; and just after this order, the order to port the helm was given; the brig was heading to the south, the steamer at that time was heading about W. or N. west; at that time the ship was heading a little more to the north than the steamer; the ship must have

been about 30 fathoms from us when we first saw her; don't think the ship could have turned her head from west to east within 30 fathoms; if the ship had put her helm hard a-starboard, her head would have turned more to the south of west; the headway would have carried her on at the same time she was turning head; a cook and a man came aboard between 5 and 6 o'clock on the 5th February; besides these 5 were wanting; the cook and boy came aboard before the light was put up; no other men came aboard that night; he didn't hear what the 2d mate hailed; he only heard him hail something when he ran on deck; there was a boy on deck, and the cook in the galley; the seamen, 3 of them, were in the forecastle; the lamp, globe lamp, was setting down on the deck; just as the brig got clear of the ship, they let go the 2d anchor; the signal lamp was hanging on the port fore swiftsure; the side of the lamp without a glass, the blind side, was turned towards the eastward; it was obliged to be so turned; any vessel coming up from the eastward could not see the light; after the collision, the next time he saw the light was when he was returning in the boat that night; it was hung in the same place.

Examined by Mr. Mitchell. When the captain was away, the brig was in charge of witness; the 2d mate, 3 men, cook, and boy, and himself, were all who where on board that night; soon after the 2d mate went on deck from tea, may be 5 minutes after, he heard him hail—it was almost immediately after—(Mr. Wilkinson repeats his objection to diagram marked A); the steamer was crossing our bows when we first saw the ship; almost immediately after the order to haul in the hawser was given, his attention was drawn to the ship which he then saw; and following close on this order, came the order to port your helm; when this order was given, the ship was about two-thirds of the length of the hawser from the brig, on our larboard bow; if the ship had ported her helm, there was room for the ship to have passed between the brig and the shore—don't know that she would have cleared our quarter; the headway on the ship would have aided her in obeying the helm; if he had been aboard that ship he would have ported the helm, because the flood-tide would have carried him round; if he had put the helm to starboard, the tide would have carried him against the brig; if he had been aboard the ship, he would have let go the hawser and put his helm a-port; if the hawsers were fast, and the helm had been put to port or a-starboard, they would even then have run into the brig, if it had been hung.

Examined in reply. At the time the ship and steamer were coming in, the blind side of the lantern would have been turned towards them.

JOSEPH E. WRIGHT.

Sworn to before me this 18th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

WEDNESDAY, 19*th March*, 1856.

For the Brig.

Lewis McNorton, sworn. Is 2d mate of the James Gray; was on board on night of Feb. 5th; was lying in the stream about a quarter of a mile above the fort, about 40 fathoms, at low water, from the bank on the other side of the river, heading about south; they were at anchor; it was about ¾ flood, running pretty strong; had been lying there about 4 days; hauled out there on the 1st or 2d February; on the evening of the 5th was on deck, on the larboard side; saw the ship and steamer first outside between the two forts coming up; their course was west till they turned south and west of Castle Pinckney; saw them first about an hour before the accident; was looking at them all the time; saw them turn to the west side of the fort; was not down to tea more than 2 minutes; he continued to look at them till the accident; went to tea after he first saw them, and before the ship rounded the little fort; returned on deck so hastily to watch a man who was in liquor on the deck; when they first turned the fort the steamer was heading west-northwest, the ship was heading west, west by north; after the turn, coming up the river, the ship took the course of the steamer, west by north; the steamer turned, headed west by south, and the ship was heading about west-northwest; when the steamer got within 40, or 45, or 50 fathoms of the brig, the steamer turned off; it was dark; can't say exactly the distance, because it was dark; he sung out to the steamer, "where the hell are you going?" the steamer was then turning; the ship was then heading west-northwest; the steamer was about taking course west by south; heard a voice from the steamer, "haul in your hawser;" heard a voice from the ship, "pull ahead;" heard a voice, thinks from the steamer, saying, "put your helm a-port;" don't know whether it was meant for us, or the steamer, or the ship; is uncertain whether the cry, "haul in your hawser," or "pull ahead," was the first; the steamer was nearest to us not more than 2 minutes before the collision; can't tell whether the hawser was let loose before or after the steamer passed our bow; can't be exact about the time; it was very short, not more than 3, 4, to 5 minutes before the steamer crossed our bow; if the ship had kept the same course she had when the order "haul in your hawser" was given, she would have come into the larboard side of our fore rigging, but she luffed up; the steamer never was nearer to us than about 40 fathoms; if the order "port your helm" was meant for the ship, he thinks it was a wrong order; he thinks the casting off the hawser at that time was wrong; the whole head of the vessel was carried away; the first thing was the jib-boom, and the bowsprit with the gear belonging to it, all the fore rigging; don't know the length of hawser; there was room to the eastward for the ship and steamer to pass; there were lights in the

steamer; saw none in the ship; could see vessels some 200 fathoms off; could see vessels at the wharf; a signal lantern shown him is the one used in the brig; it was hung that night in the port fore swifture; it was put there about half an hour before the accident happened, and was there when the accident happened, and after the accident; the collision threw the James Gray on her beam ends; didn't see the light again till half an hour after the accident—he then saw it hung in the same place; it was burning as bright as before; witness does not know whether the light had remained there during all that time; there was a globe lamp on the deck—it was lowered at the bow to observe what damage was done; thinks it was in the cabin before the accident; it was brought forward just after the collision; can't say positively that the globe lamp had been in the cabin; one pane of glass is cracked, which he never noticed until after the collision; another pane is also cracked—it is an old crack; the dark side was aft against the fore swifture; the left hand pane of the lantern was turned to the vessels as they came up to us; the dark side was turned towards the northeast; the steamer had been approaching in a course west-northwest; the speed of the steamer about 6 or 7 knots; she was going very fast; tried the pumps that night; she made 8 inches water in about 2 hours; he did not time it by the watch; next day got men from shore, and a steamer to tow us to town; afterwards discharged a part of the cargo and commenced repairing; they went to a wharf below the post office.

Cross-examined by Mr. Brown. The man in liquor was brought on board between 5 and 6 o'clock that evening, before his supper, before it was dark enough to hang the lights; when the steamer was off on larboard bow, the ship was about 100 fathoms off; if the ship had a long hawser on, and had have ported her helm, she would have struck us probably somewhere on the beam, aft; if the brig had ported her helm, her head would have turned more to the city; the order from the steamer was just given, "haul in the hawser," and the answer from the ship was "pull ahead;" aboard vessels, the order is usually given, "pull in the slack of the hawsers," before they let go; if the steamer had pulled ahead, instead of casting off the hawser, don't know then if the ship would have passed clear; it is necessary to take in the slack of the hawser before they let go, in order to prevent its getting into a bite, and get afoul of the ship; when the steamer turned, off the bow of the brig, the ship's helm should have been turned to the starboard, to make her follow the steamer; and if she had done so, and the steamer had power enough, she might have gone clear; the order "pull ahead" was given a half a second after the order "let go your hawser;" the ship had just got clear of us, when we dropped the second anchor; the ship anchored some 40 or 50 fathoms west-northwest of us.

Examined by Mr. Mitchell. Been going to sea more than twenty years; coasting mostly; been mate a year and a half; was in the forecastle before that time; has not had much experience in sea navigation; had command of a coasting vessel when 19 years of age; when the order from the steamer, "port your helm," was given, the ship was about 100 fathoms from us; the ship had a good headway on her; if the hawser were cast off, and hung loose in the water, it would have made it more difficult to turn her head; and the vessel would obey her helm more readily going with the stream, than across it—and, without the hawser hanging, would have turned more readily to the larboard than to the starboard; all the forces were in favor of the ship's going to our larboard; except the hawser, there was room enough for the vessels to have passed to the east of us; there was not time to have hauled in the hawser in the ship, after the order was given and before the collision, nor time to change her course, so as to have passed the brig on the larboard side; thinks he heard an exclamation from the steamer, "there is a vessel ahead," as well as he remembers, and before witness hailed them; a clear starlight night, but no moon; the first mate did not come up from tea till witness had hailed the steamer; a cabin boy put up the light that night; it is witness's business to see to the lights.

his
LEWIS ⋈ McMORTON.
mark.

Sworn to this 19th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Joseph Wright, recalled. (His recall is objected to by the respondent's counsel, on the ground that he had time to converse with other witnesses since his first examination.) Says, as to his testimony yesterday about the lantern, the dark side of the lantern was to the eastward, to northeast, and the vessels approached us from the southeast, so that the left pane of the lantern was brought towards the ship.

JOSEPH E. WRIGHT.

Sworn to 19th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

John Wyckoff, sworn. Is a seaman aboard the James Gray; was aboard the night of the collision; the signal light produced was hung about half of an hour before the collision, in the larboard forward swifture; it had been put up every night; when the accident happened, the light was still in the rigging; immediately

after the collision, saw the light burning dimly, and started to take it down, but the boy got ahead of him, and took it down and trimmed it, and set it again; it was burning bright before the collision; was looking at it just before they struck; he saw it from the companion way.

Examined by Mr. Brown. He went aboard on the 2d February; she was then in the stream anchored, not moored; she let go the 2d anchor just after the ship carried off the bowsprit, as quick as we could; he was standing at the foot of the ladder; the entrance to the forecastle has a scuttle, with a slide; from there he could not see the lantern itself, but could see the reflection of it distinctly.

JOHN WYCKOFF.

Sworn to this 20th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

MAY 28, 1856.

D. C. Seixas, sworn. Says that he is one of the firm of Geo. A. Hopley & Co., consignees of the brig James Gray; remembers the fact of the collision between the James Gray and the John Fraser, in February last; she, the James Gray, was loaded, cleared, and ready for sea; almost the entire cargo was shipped by our house; we were therefore perfectly satisfied of the staunchness and seaworthiness of that vessel; the cargo was principally rough rice and cotton; the rough rice was in bulk; after the collision the rough rice was found to be dry and not damaged—therefore he concludes she must have been staunch to have stood such a shock without leakage; she was also well found in every respect for the voyage. Bill marked O, of expenses, $3,902 67, is the bill of expenses for damages to the James Gray, paid by their house.

D. C. SEIXAS.

Sworn to 28th May, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

James Jeffords, sworn. Is a ship-smith; knows the brig James Gray, which was here last winter; remembers when the collision took place between her and the John Fraser; remembers that on the 21st January (before the collision) he did some work on her; he considered her one of those staunch vessels that would last for a long time; he had worked for her some years, and knew her well; at that time (January) he would pronounce her sea-worthy; after the collision he commenced some repairs on her, from 7th Feb-

ruary to middle of March; his bill amounted to $269 42; was paid; it was for work concerning the racking of the vessel.

JAMES JEFFORDS.

Sworn to 28th May, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

DECEMBER 1*st*, 1856.

John Wyckoff. (Has testified already as to the signal light in the James Gray.) Recollects the position of the lantern on the night of the collision; has since then measured the height at which it hung; it hung 20 feet 5 inches, measuring from the bottom of the lantern to the deck; the lantern was made fast both at top and bottom; the lantern was hung, with the back to the swifture, and the two glass sides exposed to the south, southeast, and southwest.

JOHN WYCKOFF.

Sworn to 1st December, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Henry P. Carr. Master of barque Shultz; on board 5th Feb.; saw the Gray between Castle Pinckney and N. E. R. wharf, about 2 points on the starboard quarter, lying from N. N. E.; saw a signal light, (between 6 and 7 p. m.); saw the ship coming up; thought there would be a collision; he saw the light; was twice as near to the Gray as the ship was; light was as good as could be; the ship was towed in, supposes as usual; when he first saw the ship, it was not distant the $\frac{1}{8}$ of a mile; could see it was a ship; from the position of the vessels just before collision, thought the John Fraser could not pass; could see the steamer; could not have perceived an alteration of the course; ship was steering N. N. W.; Gray was lying at S. S. west, if Atlantic wharf is east and west; the way of steering and flood put them on the bow of the brig; nothing could have prevented them seeing the Gray; the Gray was more than a $\frac{1}{4}$ of a mile from him; if the mate of the John Fraser had been on the forecastle, must have seen the light; could have seen her (i. e. the hull) three miles off; saw them as soon as they rounded the castle; noticed the light burning at the time of the collision.

Cross-examined. The J. F. was in tow of the steamer; heard Herbest's voice; the steamer was ahead of the John Fraser; the steamer's being ahead, could not, from the poop deck of the ship, prevent Herbest seeing the Gray; the pilot on board of the ship, when towed, gives the directions—looks to him; must have a pilot when towed; the pilot should have gone two points further to westward; could not do so, without the aid of the steamer; would

have had to give the order to the steamer, or it would bother her steering.

Cross-examined by Mr. Mitchell. Not many minutes between seeing the steamer and ship, and the collision; the steamer, while towing, might have swept by, and the ship struck; when the collision took place, the steamer was heading W. N. W.; does not know when the hawser was let go; the pilot, while on board, is in command; there is no rule where towage ends; thinks it would have been more prudent to have anchored lower down. From the position in which he supposes the steamer left the ship, it would be impossible for the ship to go to the east; it would have been easy to do so, if it had been desired, before. Rather questions whether, if, at the distance of 50 fathoms, to port the helm would have carried her clear.

Cross-examined by Mr. Brown. Could see a vessel from a deck as easily as from the wharf. Thinks the head of the brig was to the south; thinks the light was in the port fore rigging; the Gray would have to port her helm to go east.

In reply. In coming into the harbor at night, customary to stop below; come near the wharves to save a second towage; if, as captain, he insisted on coming up, would suppose that, as captain, he had assumed the responsibility; but assent of pilot would continue his risk; look-out is always a special duty, given to those who do nothing else; the Gray was lying in a common anchorage, where it may be expected that vessels will lie at anchor.

Morris Selgman. Knows the Gray; the time of that ship is worth from $40 to $50 per day; she was here a few days over 2 months.

Cross-examined by Mr. Brown. Is clerk of G. A. Hopley & Co.; she was cleared before the collision; after the repairs were made, he cleared her again; as soon as she could be got ready, she went to sea; has no personal knowledge of the time employed in repairs; repairs were not delayed for instructions; the captain ordered the repairs; estimates the value of each day from the freight business; the freight was bound to Antwerp, and was worth about $8,000; the voyage is 40 days; she had a crew before she was cleared.

In reply. Did not have to discharge her cargo; only a part; there was no unnecessary detention.

UNITED STATES OF AMERICA, *So. Car. District.*

OWNERS OF BRIG JAMES GRAY
vs.
SHIP JOHN FRASER and STEAMER GEN. CLINCH, &c. } In Admiralty.

Interrogatories to be administered to Alfred W. Tooker, a witness now in Bremen, to be examined on behalf of libellants.

1. What is your occupation, and where were you on 5th February last?

2. If you reply that you were in the port of Charleston, So. Carolina, then state particularly where you were at about half-past 6 o'clock in the evening of that day, and whether or not you observed the brig James Gray; and if yea, state where she was lying, and how she bore from you?

3. Did you, or not, at that time, observe whether the James Gray had a light; and if yea, where was said light hung? was or was not the said light distinctly visible? and could you, or could you not, see the James Gray distinctly?

4. Did or not any thing occur to draw your attention to the James Gray? If yea, state what it was, and what you observed when you looked towards the James Gray?

5. Was there, or not, a light hung in the rigging of the James Gray? If yea, state where, and whether the same was or not a bright light, and plainly visible, and whether or not the James Gray was at that time plainly visible. Where was she lying, and how did she bear from you?

6. If you say that you observed vessels in the neighborhood of the James Gray, please say, if you know, what vessels they were?

7. Did you, or not, hear any thing said, by any one on board of either, and which of said vessels? and if yea, please state what was said?

8. Do you know any other matter, or thing, material to libellants? If yea, state the same fully?

MEMMINGER, JERVEY & WILKINSON,
Libellants' Proctors.

Alfred W. Tooker, mate of barque E. Schulz, sworn and examined. I am the mate of the barque "E. Schulz," and was on board my vessel on the 5th February last, then lying in the port of Charleston, South Carolina. At 6½ o'clock p. m. that day, I was on the deck of the E. Schulz; my attention was called to the brig "James Gray," by Capt. Carr. She bore about two points E. N. E. from us. I noticed in the fore rigging of the James Gray a light, which was distinctly visible. It was a bright light. I could see the "James Gray" distinctly. I observed a steamer and a ship near the James Gray, the ship in tow of the steamer. The name of the latter I do not remember. The ship was the "John Fraser." I heard the captain of the ship say, "Let go the anchor;" but could distinguish no other words. The ship was across the bows of the "James Gray;" The steamer did not stop at all, but went straight on, as if the tow-line had been slipped.

ALFRED W. TOOKER.

Defence of the Clinch.

FRIDAY, 14*th March*, 1856.

James Sullivan, sworn. Was aboard the Clinch when she towed the John Fraser up; remembers the collision between the Fraser

and another vessel; heard the noise; he was aft on the steamer; he is a deck hand; saw the vessels—saw them after striking; saw no light aboard the vessel the Fraser struck; saw no light in her afterwards.

Cross-examined. He was on deck just before they struck; don't know the name of the man who acted as captain of the Clinch that night; heard him sing out at different times before they struck—told us to let go the hawser; the pilot was on the upper deck—we were on the lower deck; the captain sung out to the captain or pilot of the Fraser—took no notice what he said; he heard their own pilot give the orders at the time, but can't remember them now; can't say whether the other vessel obeyed the orders or not; the brig was on starboard side of us—we had passed her clear when we let go the hawser; the captain of the Clinch sung out before we let the hawser go; didn't see the brig till they struck—saw her immediately afterwards; heard the noise, didn't see the blow; saw no sails set in the brig—saw the bare polls and the rigging; don't know whether the brig moved or swung round after the collision; they were nearer the brig just before the collision, before they turned off, than they were after the collision; saw no lights in the brig at all—we were looking at her; he was on the larboard side of the steamer, near where the hawser was attached—this was the side off from the brig; his business there was to attend to the hawser; never saw the brig until they struck; the hawser was quite long; could see the Fraser plain; could see the men aboard of her; they let go the hawser because they were done towing.

Examined in reply by Mr. Brown. They let go the hawser before he knew the brig was near; when the collision took place the brig and the Fraser were both astern, and he was in the best place in the steamer to see them; he would not have let go the hawser unless he had been directed; our captain or pilot ordered it to be let go, and we let go; the regular captain of the steamer was sick; could not see the brig until some minutes after they let go the hawser—not until she struck. They (witness and others) were standing, making ready to let go the hawser, before the order was given; while standing there, they could look around where they had a mind to; our captain or pilot sung out something to the captain of the Fraser, both before and after letting go the hawser—give him some order; saw no lights at all in the brig; all our deck hands were looking out to see; when they struck, the steamer was about 600 yards from them—about as far as the corner of Church street from this office; says if there had been a light in the brig must have seen it.

JAMES SULLIVAN.

Sworn to 14th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Luke McCannon. He was employed in the Clinch when she was towing up the John Fraser—he was a deck hand; remembers the collision between the J. Fraser and a brig—he was standing aft; the stern of the steamer was the part nearest the vessels in collision; we were aft, letting go the ship's hawser; he had been around there some little time—he had been ordered there; saw the brig a short time before the ship struck—a very short time; they were busy just at time of the collision, and took no notice; his attention was called to it by the noise of striking; looked there immediately; saw a light moving from aft to forward in the brig, just after the collision—saw no light in her before this; didn't see a light in her fore rigging—there might have been one there, he did not notice; he heard the captain or pilot of the steamer sing out to the captain of the Fraser; don't know what he said—didn't understand what it was.

Cross-examined by Mr. Wilkinson. The regular captain of steamer (Grantham) was not aboard that night; Carnighan came that night as captain, to tow the vessel; is a stranger to witness; he was aft in the steamer; was not looking out ahead; his attention was drawn to the John Fraser, waiting orders to let hawser go, up to time of collision; we were about as far as to the corner of Church street—a pretty long hawser—from the steamer to the Fraser; could see the ship plain; could not see men on her deck—did not see them—might have seen them, if he had looked sharp; the steamer passed the James Gray without knowing it; he was not in a position to have seen a light, if there had been any aboard the James Gray; he saw the brig just before they struck; didn't look to see if there were lights on board the brig at that time, before the collision; he saw a light coming from aft to forward in the brig after the collision; saw both vessels distinctly just before they struck; didn't know they were going to strike till he heard the noise; didn't see what damage was done to the James Gray; sent no help from the steamer; did not look for lights particularly after the collision, but he saw one moving from aft to forward in the brig—not a very large light; don't know whether the John Fraser obeyed the order given her; don't know whether the pilot was angry at the conduct aboard the Fraser; the pilot was the person in command of steamer; there might have been other lights aboard the brig that night, without his seeing them—didn't look for any; don't know by whose fault the collision took place that night—can't say whether it was the steamer's; the steamer had passed the brig, but he didn't see her till she let the hawser go; the brig's bow was to the side of the steamer when she cast off her hawser, and a short time after that occurred the collision; can't say what time it would take for the John Fraser to change her course; when witness first saw the James Gray, the steamer was a little above the brig in the stream; immediately after this the collision took place.

Examined by Mr. Brown. As the steamer came up, he being in the stern, could not see ahead; after the steamer passed the brig he was in the best position to see her; the steamer had passed before he saw the brig; the hawser was let go before the collision; and soon after he saw the light on the deck of the brig; when the ship and the brig were together he did not see any light in the rigging; he did not look; only saw the light on the deck; the ship had not passed the brig when we let go the hawser; thinks the steamer turned just after loosing her hawser; the steamer, after collision, lay between the vessels and the wharf; heard an anchor chain paying out, don't know whether from the ship or the brig.

his
LUKE ⋈ McCANNON.
mark.

Sworn to 14th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Examination by Mr. Mitchell.

Capt. Carnighan. Came up South channel; came in between two vessels with lights; hailed ship between quarantine buoy and Castle Pinckney to take in hawser; Herbest asked him to take him up; said he could not; off Adger's wharf cast off; as he turned, said to Lee, "do you see that ship?" he was 40 fathoms, the ship 100 fathoms; first saw the brig after the hawser was let go; no light; room for the ship to have passed between the Gray and east shore; the Gray was in the centre of the river; if the helm of the J. F. had been hard a-port, would have gone clear; had refused to bring him up; it was clear, but smoky; considered Lee in charge of the ship; witness's duties ended with letting go the hawser; it was the duty of the pilot of the steamer to judge how far he could bring her up safely; if a light had been in the Gray the collision would not have occurred; there was a proper look-out in the steamer; saw a light after collision coming out of the cabin; does not consider this a proper signal lantern.

Cross-examined by Mr. Memminger. Two hands forward, and one at the wheel; Capt. ——— paid him his pilotage; witness was under Lee's control; towed the ship as far as he thought safe; Lee gave no order to cast off; warned them twice; the pilot of the steamer determines the extent of towage.

Defence of the Fraser.—Testimony for the John Fraser.

Wm. A. Reed, sworn. Is an apprentice aboard the John Fraser; he was aboard when she was towed in on the 5th Feb'y; saw several

vessels in the stream that night; they had lights; some 3 or 4 vessels he saw, and saw the lights in the city; it was a clear night; saw the stars; don't know whether there was a moon. At the time of the collision the captain was on the topgallant forecastle; there were a number of seamen there; the 1st mate was there; don't know whether the 2d mate was there; recollects the captain of the Fraser telling the captain of the Clinch to drop him at Fraser's wharf; the captain of the Clinch told him he reckoned he had headway enough on. Captain Herbest told the captain of the Clinch to back up in order to gather in the hawser; the men were waiting on the topgallant forecastle for that purpose. Some one on board of the steamer asked if he saw the vessel; he did not see any vessel; he was on the galley. Just after the question, whether they saw the vessel, he heard the pilot, or somebody, say, "your hawsers are loose, port your helm;" the ship then had headway on her; he did not see the brig before they got afoul; the forward shroud side of the main rigging of the John Fraser struck, and the quarter-piece of the stern (or fashion piece); saw the James Gray after the collision, and her bowsprit was carried away; he heard no cry or caution from the James Gray before the collision; he don't know whether the John Fraser passed the brig to the larboard or starboard side of the brig after the collision, but the next morning the Fraser was to the north of the brig; saw no lights in the brig; could not distinguish any one on board of the brig; he heard the carpenter say she had no lights, and then saw them putting lights, he thinks, in the main rigging—this was may be 3 to 5 minutes after the collision; don't know where the steamboat was at the time of the collision.

Cross-examined. Does not know the names of the vessels he saw in the stream; he don't know what part of the stream they were in; can't say how long before the collision he saw these vessels in the stream; he was standing by the galley door, making ready to lighten along the hawse; the lights he saw in the vessels was before they met the James Gray; saw the lights over the larboard side of the ship, as well as he knows; is not acquainted with the harbor; it was a dark, but pleasant night; when he said clear, it was dark, but pleasant; when the cry came from the steamer that a vessel was ahead, he does not know how the James Gray lay, because he did not see her; he did not see her till the collision; he was not in the forecastle; was not in a position to see the brig before the collision; when he heard the cry from the steamer that the hawser was loose, was about two minutes before the collision; when he heard the cry to "port the helm," he don't know, but supposes the helm was put to port—and he heard the captain of the John Fraser sing out, "hard a-starboard;" this is just a contrary order to "port your helm;" when the collision was in the act, he saw no light aboard the James Gray.

In reply. The ship had a pilot on board—he was aft; and the captain of the Fraser went forward, by direction of his pilot, to converse with the captain of the steamer. The captain of the Fraser was then on the topgallant forecastle at this time.

WILLIAM A. REED.

Sworn to 11th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Oscar Scott. Is carpenter aboard the John Fraser; was there when she was towed in on the 5th February; they passed some vessels before they met with the James Gray; some three or four vessels; they all had lights, every one; the steamer's hawser for the John Fraser was about twenty or thirty fathoms; they continued at that distance all the time; he was on the topgallant forecastle at the time of the collision, the best place for a look-out; the captain, the first mate, and several of the crew were there, making ready to haul in the hawser when it was cast off; heard the captain of the Fraser tell them to back up to take in the hawser; heard the captain say to the pilot, "anchor us as near Fraser's wharf as he could;" the pilot answered, "he would, as near as he could;" the ship was under headway; when captain Herbest called out to back up, in order to take in the hawser, he replied, "the hawser is gone;" this was some two or three minutes before the collision; he was almost aboard the James Gray before he saw her. He heard the pilot aboard the steamer cry out, "put your helm hard a-starboard," and the captain (H.) of the Fraser cry out, "hard a-starboard." The foretopmast back-stay came afoul of the brig, and hit the James Gray on the jib-boom of the brig, and the forward shrouds of the main rigging caught the bowsprit of the brig; neither saw or heard any one aboard of the brig, until they got clear of her; saw no light aboard the brig; the brig was heading south, the tide being flood; after the collision the ship John Fraser passed to the starboard of the brig; as the ship was passing, during the collision, the brig let go her anchor; this was when the stern came in contact—he run aft and saw it; after the collision, he saw the light in the fore rigging; saw no light before or during the collision; at the time of the collision, he heard the captain of the Fraser make some remark about the lights in the brig; heard the captain of the Fraser say, at the time of the collision, when they were in contact, "the vessel had no light;" did not see the light in the rigging of the brig until after the ship was anchored; although he was looking towards the brig, he did not see the light in the rigging till half an hour afterwards; thinks it was in the fore rigging, but, being dark, can't say whether it was the fore or main rigging; the light he saw in the rigging was not there at the time of, or before the collision; he heard no caution from the James Gray until

after the collision; he remained there on the forecastle until after the vessels parted; he being carpenter, wanted to see what damage had accrued; saw the brig next morning; the fore rigging was not gone; the bowsprit and other bowsprit gear were gone; never saw the steamer after the collision; probably some two minutes before she let go the hawser, when they called out the hawser is gone, the ship was right on the brig.

Cross-examined. In passing the ships with lights in the stream, they were on both sides of us, but most of them were on the larboard; it was a half or quarter of an hour after they passed the lights, before they came into collision; it was about 5 minutes before the collision that Capt. Herbest called to be put near Fraser's wharf; the steamer was on the larboard bow while they were towing us, and his attention was turned towards that way; the hawser was out of the larboard hawse-hole; he could see the steamer because she had light; could not that night have seen the brig 2 or 3 fathoms off; after the collision he could see the rigging of the brig some 30 fathoms off, by the light in the rigging; it was so dark he could not see people on the deck of the brig, but heard them; the helm was put hard a-starboard when the captain ordered it.

In reply. It was so dark, they had lights in the ship to attend about the hawser, &c.; he went aft and helped the man put the helm a-starboard.

his
OSCAR ⋈ SCOTT.
mark.

Sworn to 11th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

MONDAY, 17*th March*, 1856.

Robert Cameron, sworn. Was a seaman aboard the John Fraser on 5th February, when she was towed by the General Clinch; saw vessels lying at anchorage; all had lights except one, i. e. the brig James Gray; should judge they were about half a ship's length, or a little more, when we first saw her; he was standing on the windlass, forward part of ship; standing ready to haul the hawser in, when let go; there were other men round about there, but can't say any others besides himself were on the windlass, who could see above the bulwarks; witness could see all around the ship, in every direction; he saw no light in her rigging; the captain of the Fraser was on the topgallant forecastle; don't recollect well, but thinks the mate was also there; on the forecastle (topgallant) they could see all around as well as anybody; just before the collision, heard the captain of the Fraser sing out to the captain of the steamer to keep farther out away from that brig, i. e. James Gray; they made

no reply, but nearly at the same time the captain of the steamer gave the order to the J. Fraser to put the wheel hard a-starboard; saw the brig at this time—he was looking at her; the captain of the Fraser sung out a second time, to keep further away, and the reply was, that the hawser was all gone, and immediately they came in contact; this conversation took place with respect to this brig, James Gray; the ship's fore topgallant back-stay took off the brig's flying jib-boom, also the main shrouds of the ship, carried away the jib-boom and bowsprit; the ship made no halt at all, just ajar, and went along; heard the brig let go a second anchor, just after we were clear of her; just about the time of the collision, heard the captain of the J. Fraser sing out, "damn that fellow—she has no lights set;" (Mr. Wilkinson excepts to the words of the captain being given in evidence;) he could see himself that the brig had no lights; is positive she had no light; a very short time after the 2 vessels struck, saw a light aboard the brig; they brought the light aft to forward, to look about, and then hung it in the rigging; it was hung in the fore rigging, don't know which side; after the ship came to anchor, our bow was towards the brig; he had the middle watch that night, and saw the light there all the time; he is certain that the light he saw in the fore rigging was not there when the vessels came in collision; is certain that he saw it put there after the collision; the ship, when she passed the brig, passed on the town side of her; the vessels with the lights, they passed *they passed* on the larboard side, except one which was on the starboard; can't tell whether it was a ship or a brig—didn't notice; it was light enough to distinguish if he had noticed; didn't pass very nigh them; saw the brig next morning—didn't notice whether the fore rigging was gone or not; when the vessels were approaching together heard no caution whatever from the brig; didn't see any one aboard the brig till he saw the man with the light; it was not a moonlight night; if we had been looking for an object, think we might have seen the brig a half a mile without a light; the ship anchored off from the brig—nothing like a half mile; could have seen whether it was a ship or a brig from there, after she had a light; the light in the rigging don't help you to tell a ship from a brig, it rather makes it more difficult; should say they anchored 5 or 6 ship's lengths from the brig; just before the collision, the steamer was standing not exactly ahead, a little on our larboard bow, slanting off to the town side; the vessels on the diagram marked A, he says are in the positions they occupied, except, he thinks, the bow of the brig should have been turned more to the city than is there represented. (Mr. Wilkinson objects to the diagram being in evidence, it not having been authenticated.)

Cross-examined. Could see distinctly all the vessels they passed up the river; took the steamer just outside the bar; should think the hawser was about 30 fathoms long; the vessels at anchor were

lying with their bows down the stream; didn't see the Jas. Gray till just before the collision; the hawser was to be hauled in the ship; he was not a look-out—had no orders to look out; the captain was there himself; the other men in the main forecastle could not see over the bulwark—it is too high; don't know whether the ship had a light up—he did not see any; the topgallant forecastle is on a level with the gunwale of the ship; he says the mate of the ship is gone to New Orleans; putting the wheel hard a-starboard, would have turned her head to the larboard; don't know whether it was put to starboard; the captain of the Fraser passed the word to the man at the wheel, and he answered it; this was a proper order for the circumstances they were in; he can't say whether it was right in the steamer to cast off the hawser at that time—he has no experience in towing vessels; it takes all vessels some little time to answer their wheels; some take more time than others; a vessel in tow won't follow the steamer in the same track, when she changes her course, but very nearly; the hawser was attached to the larboard bow of the ship; when they cast off the hawser, the steamer was past the Jas. Gray; don't know whether they sent any one aboard the brig after the collision; can't tell whether the steamer had changed her wheel before or after he learned that the hawser was gone; supposes the vessel in tow was making some four or five miles an hour—he don't *no.*

Examined by Mr. Mitchell. He had been standing on the windlass but a very short time before the collision; before that he had been on the main deck, and the word was given to make ready to take in the hawser; he did not go to the windlass immediately on hearing the word given—some four or five minutes afterwards, perhaps; the word was, "stand by to take the hawser in when it is let go;" before this order, heard no words pass between the captains of the Fraser and the Clinch; some five or six minutes after the above order about the hawser was given, when the conversation took place between the captains; the second order from the captain of the Fraser to the captain of the Clinch followed immediately upon the first order—very short time after they said the hawser was gone. (Mr. Wilkinson objects to Mr. Mitchell's cross-examining this witness.) When he was on the windlass, the James Gray, when he first saw her, was about a half the ship's length from the Fraser; the steamer then was about abreast of the brig; at that time he saw a light, supposed to be a vessel on the starboard side of the ship; did not hear the words "James Gray" that night; is sure the captain said keep away from the brig—didn't say the vessel; he knows he meant the James Gray, because there was no other brig there; didn't hear the pilot of the Fraser give the order about helm a-starboard—it came from the captain; the night was a litle cloudy.

Examined in reply. The lights he saw that they passed he could see, and see the vessels themselves, and some could distinguish what kind of vessels they were; when a man stands on the top-gallant forecastle, he can see well all around; he may have been five, six, or seven minutes on the windlass when he heard the hawser was gone; very soon after this was said the vessels came together; immediately after the news that the hawser is gone, the vessels came together.

R. CAMERON.

Sworn to before me, this 17th March, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

MARCH 20*th*, 1856.

Francis A. Mitchell, third mate of the John Fraser, sworn. Native of Charleston; was on board of the Fraser on the night of the fifth Feb'y; on coming round the Castle Pinckney, he was aft near the wheel; when abreast of the castle, he was ordered to send the men forward to stand by to take in the hawser; he went to the top-gallant forecastle with about six men; rounding the castle, the ship was heading somewhere about southwest for the New York wharf; saw no vessels in coming up; at the time of collision it was flood tide; just before the collision, he went down from the topgallant forecastle to the main deck, for a minute or so, and then returned to the forcastle; was there about twenty minutes—was there with the captain; it is the best place to look round from; the rail of our ship is very high—standing on main deck can't well see over the rail; first saw the brig in about hailing distance—about the length of the ship; the steamer, in towing the Fraser, was ahead of the ship; there was nothing between the ship and the brig; while approaching the brig, the steamer lay between the ship and the brig; just before he saw the ship, the steamer slackened up and stopped; the paddles were still going, but there was headway on the ship; her speed was about six knots; just before the collision the steamer changed her position, and there was nothing between the ship and the brig; it was then he first saw the brig, and she was about a ship's length off from us; saw no light in the brig; could not help seeing it if it had been up; heard no hailing or caution from the brig; heard captain of the Fraser ask, "What the hell did you let go the hawser for?" this was the first thing he heard; he afterwards sung out, "Jerk her ahead;" he judges that the captain didn't know whether the hawser was let go or not; he supposes that the captain said "Jerk her ahead" because they were running into the brig, and thought that by doing so he would prevent it; when the vessels came together, the brig's jib-boom, bowsprit, all the forward part, i. e. all the forward gear that projected over her

bow, was carried away; saw no light at that time in her rigging; just when we struck, heard the captain say, "All hands see that fellow has got no light up;" heard no anchor let go from the brig about that time, or after it; if one had been let go he must have heard it; we anchored about as far as from here to the corner of Church street from the brig; when the ship was at anchor we lay with our bow towards the brig; about ten minutes after we anchored, saw a light put up in the brig's rigging; saw them put it up.

Cross-examined by Mr. Mitchell. Just before the collision heard no order from the steamer; heard the captain sing out to the pilot, "put the helm hard a starboard;" when he was on the forecastle, his attention was not directed to any orders from the steamer; saw no light in the brig until after the collision; saw some one standing aft in the J. Gray—saw no one forward; it was a dark night; we had our light on the larboard fore rigging—he put it up himself; if there had been a light in the brig, he must have seen it before he saw the brig; saw the lights in town; has no doubt if there had been a light in the brig, they would have avoided a collision. (This last answer objected to by Mr. Wilkinson.)

Examined by Mr. Wilkinson. Witness stood on the starboard bow of the ship on the forecastle; the hawser was on the larboard side; he stood there to be out of the way, if the hawser should part; the hawser was attached to the middle of the steamer's stern; we all were standing looking around over the bow of the vessel; while standing there, the steamer was between the ship and the brig; none of us could see the brig—did not see her till we were nearly on to her; he saw the slack of the hawser in the water, before the captain said "jerk her ahead;" just before the collision, the steamer let go the hawser, and got out of the way of the ship and brig; if she had not, she would have been caught beween the brig and the ship; it was a good move for the steamer, but a bad one for the J. Fraser, because it was just the moment we wanted her; just before the collision, heard the captain sing out to the steamer, "did you see that brig?" then the hawser was let go; some one sung out from the steamer to haul it in; the order from the captain of the Fraser, "put the helm hard a-starboard," was meant for the pilot, who was aft, on his own ship; witness thinks the pilot of the J. Fraser should have been forward, not aft, where he was—he had no business there; there was no danger aft—the danger was forward; thinks the pilot of the John Fraser was partly to blame; there is no one to blame chiefly but the steamer, i. e. the captain of the steamer—that is to say, as between the ship and the steamer—because the steamer was ahead, and could have seen the brig, whether she had a light or not up; he could have seen her in time to jerk us out of the way; the smoke of the steamer was between the ship and the brig, and prevented our seeing the brig sooner; thinks that if the ship had been coming up without the steamer,

they could have seen the brig in time to avoid her, if the brig had had a light up; could see the lights in the city; might have seen the hulls of vessels, if they looked sharp; could not tell the rig of a vessel at the wharf.

Examined in reply. The steamer turned off so suddenly when near the brig, he thinks, in order to get out of the way; it is reasonable to suppose that this was the first time the steamer saw the brig; (Mr. Wilkinson objects;) the blame which he attaches to the steamer, is only as between the ship and the steamer.

F. A. MITCHELL.

Sworn to 20th March, 1856.

H. Y. GRAY, *U. S. Com'r and Clerk.*

11th NOVEMBER, 1856.

George Thompson, captain of the brig Clinton, sworn. Remembers the collision which took place between the James Gray, the steamer General Clinch, and the John Fraser; (is a mariner; has been captain 4 or 5 years; was captain of the Clinton at the time of collision;) he was then lying at Mills's lower wharf, South Atlantic; the brig Jas. Gray was lying in the stream, opposite to him; his attention was not drawn to the vessels until he heard the noise attending the collision; the noise was not of the collision, but of persons hallooing, and previous to the collision; could not distinguish any words; don't know from which vessel the sounds came; it seemed some distance off, and from that quarter where the vessels lay; saw no light in the rigging of the James Gray; he was on deck before the vessels struck; there seemed to be lights passing about the deck of the James Gray after the collision; he saw the reflection of light; did not see any lanterns themselves; there was no one on deck with him; there was some one on the wharf near him, to whom he remarked, "it was a pity that vessel had no lights up;" don't remember who the person was; (Mr. Wilkinson excepts to the statement made by Capt. Plummer to witness;) some days after the collision he had a conversation with Capt. Plummer; they met by accident; there were some few masters of vessels talking together; Capt. Plummer said he was not on board of his vessel at the time of collision; he was detained by his boat not having been sent to him in compliance with his orders; he said his mate, and second mate, were both on board at the time; Plummer said his mates said they had a light up; witness replied that he did not see any light up; Capt. P. asked witness if he saw the collision; he told him he did; Capt. P. said "did you see a light up?" I said "I did not;" witness before the collision, some 20 minutes before, saw the vessel, when it was dark enough to make him think that vessel ought to have had a light up. Capt. P. said he thought it hard that deponent should be a witness in behalf of the John Fra-

ser; and deponent said he ought not to think hard of it, for he was not going to testify in favor of the Fraser or against the James Gray, but to tell the facts. They parted, and deponent has since sailed to New York, and then to Nantz, and has lately returned here. A vessel going north, towing a hawser 60 fathoms long, at a rate of 4 miles an hour, the hawser being out of her larboard port-hole, would turn her head more readily to the port side, with her helm put to starboard; if her helm had been put to the port side, her head would hardly be brought to the starboard; (the port side, in this instance, being west, the starboard east;) if he had been in a vessel towing a hawser in that condition, and found an impediment some 20 fathoms ahead of him, he would order his helm a-starboard, as the best way to avoid it; he remembers the position of the Jas. Gray, and there was plenty of room between her and the city for the John Fraser to have passed. Mooring and anchoring is not the same thing; anchoring may be done with one anchor—mooring must have two anchors; where there is a narrow passage, and many vessels are passing, mooring is the safer mode; a vessel may have two anchors out, and yet not be moored; in mooring, a vessel would swing round directly in her own length, the bow being the pivot; in anchoring, she would swing round in a circle as wide as the radius of the vessel and her cable together, the anchor being the pivot.

Cross-examined by Mr. Mitchell. The effect of a hawser which a ship was towing, upon her course, would depend much upon its length; if a vessel was dragging her hawser, it would not prevent its obeying her helm, though she would guide more readily to the side from which the hawser hung; don't think the effect of the hawser upon the steering would be felt much, until the hawser got astern; unless the hawser were let go at an angle from the bow of the ship, he thought the Jas. Gray was at least two-thirds of the way over between the city and the bank; if there was any objection, she was too far over; he would think she would swing at anchor very near the bank; he generally anchors over there at 20 or 25 fathoms anchor; the James Gray, he would think, was about 120 or 130 feet; he would not think there was room enough for a ship like the J. Fraser to pass prudently between the Gray and the bank; it was a pleasant night; didn't observe any smoke or haze; nothing to prevent seeing a light; didn't observe any other vessels about; saw no other lights; if the Gray had had lights the J. Fraser could have seen them at least 400 yards off; if there had been a light in the Jas. Gray he could have seen it; after the collision he did not see any lights in the rigging of the Gray; he did not stay long after the collision; he went to tea; when his attention was drawn to the vessels, there was a small space between the bows of the vessels; they had not come together; but not half a minute elapsed before the bows came together; don't think he staid there more than 10 minutes before he went to tea, and then on shore.

Cross-examined by Mr. Wilkinson. Has often anchored where the Gray lay; it is within the allowed anchorage; you are allowed to anchor as near the opposite side as you please; on the city side you must anchor in a certain distance from the wharf; vessels anchor all around about where the Gray was; should think she was 500 or 600 yards from the wharf; thinks her anchor was about parallel with our wharf; saw her there several days; thinks she lay there 7 or 8 days; he was at tea when he first heard the noise; when he looked towards the Gray saw no light in her; saw none in either of the vessels; didn't observe the steamer at all, either before or after collision; he could see that the vessel was a ship, and he knew the other was the brig James Gray; it was then flood tide; the Gray was lying with her head down; had been several times aboard the Gray; she seemed a good, staunch, a very strong vessel; saw her after the collision; if a steamer had come within 20 fathoms of the Gray that night, and had any look-out, they must have seen her; thinks it competent, with good seamanship, for a steamer to have brought a vessel within 20 fathoms of the Gray, or even nearer; if the steamer had changed her course, and let her hawser go, when 20 fathoms off from the Gray, with a headway of 4 or 6 miles an hour on the Fraser, the John Fraser being 50 fathoms off from the Gray, if all parties had kept a good look-out, would have been able to avoid the collision. The James Gray, though at anchor, was lying in the same position as if she had been moored; the harbor regulations say, that vessels lying in the stream some days must be moored; if he had been coming in from sea, he would have kept a look-out, and expected to see vessels about where the James Gray lay, only she was further over than usual. When he has been towed in, the pilot is generally in the ship, and the orders come from the pilot wherever he may be; never saw two pilots, one in the ship and one in the steamer; the pilot is bound to bring a ship to an anchorage; the captain of the ship is subject to the orders of the pilot, until his ship comes to anchor; if he had been coming in, in a ship that night, he would have come as far over that way as possible, because that side is generally clearer; small vessels frequently being anchored nearer the wharves, and the ship would have more room to turn. He is on very friendly terms with Capt. Plummer, and also with Capt. Herbest. If he had been coming in that night, he would rather have taken the centre of the channel than the sides; but vessels anchor all about in Charleston harbor. In coming into port, the pilot generally gives the order to all hands to keep a good look-out.

In reply, by Mr. Brown. The faster a ship (like the J. Fraser) sails, the better she will mind the helm. A vessel won't steer well with less than one mile speed; a vessel going slow, would mind her helm more readily against the tide than with it. If the James Gray, being at anchor, had put her helm to starboard, she might

have turned her head to the extent of her cable; and if she had done so, they would have passed clear. When the steamer was ahead of the ship, the ship could not see an impediment ahead; that business is for the steamer. He believes it usual in Charleston to have a pilot in the steamer, as well as in the ship; the steamer is always in the employ of the owners of the ship, and the steamer is under orders of the pilot of the ship. A look-out in a ship, when the steamer is ahead towing, is of little use to see impediments in front of the steamer. If the steamer had left the ship, with that headway on just 20 fathoms off from the brig, it would have been wrong for the Fraser, having her hawser out of the port-hole, to have turned her head towards the east side of the brig; he thinks he could see further, looking from the sea towards the wharf, than looking from the wharf to the sea. Circumstances might justify a steamer in letting go the hawser without giving notice, if she suddenly had found herself right close to the brig. He thinks if the pilot of the ship had ordered the helm to be put to port, when the captain thought it ought to be put to starboad, still the pilot's order should be obeyed. If he had been on the forecastle and the pilot at the helm, and he saw an impediment, if the pilot gave an order he knew to be wrong, he would countermand it—if the pilot insisted, he would have to submit.

GEORGE THOMPSON.

Sworn to 11th November, 1856.

H. Y. GRAY,
U. S. Com'r and Clerk.

Captain Adkins. Is captain of a steamer; has been pilot for 20 years; was pilot in the Nashville; was in Georgetown when the collision occurred; he was in Charleston the night before; was pilot of the Nashville that Monday night; brought her in half-past 2; saw the brig James Gray; passed near her, not over half the length of his ship; no light visible; the Gray was above his wharf; could not see the wharf; came near to backing in her, for want of a light; did not report the omission; left for Georgetown, and did not have time; Gray was about the middle of the channel; she was anchored in the place appointed for inward vessels; any outward bound vessel lying square with the wharf, is in the way; she was lying N. E. from the N. Atlantic wharf; a shoal to the east; nine-tenths of mile from wharf to shoal; with a flood-tide would head S. E.; the way he considered as heading down S.; light in port rigging would be opposite side from wharf; it might be hidden by the mast from a person on the wharf. (Lantern produced.) Such a light is to put under the bowsprit; used in the channel as a signal; signal lantern is without a dark side, set up 10 or 15 feet; a vessel with a bowsprit light at sea, or bay, indicates her in motion; in a harbor,

a light in the rigging indicates a vessel at anchor; it must be on the bowsprit, or lashed to a mast, to make both lights certain; does not think the crack in the lamp caused by a blow, because there is no indenture; a vessel is kept as far from the towing vessel as a 65 fathom hawser will let her be; try to keep as near ahead as possible; a vessel should be going four knots to obey; a wheel is quicker than a tiller; slacking off, in 60 to 100 fathoms, could not alter her direction; her hawser then larboard, not astern, she would more readily come to port; helm must be starboard; if hawser was not astern, would come to faster. If the Fraser was towing her hawser larboard, would put the wheel starboard; if he could see the eighth of a mile, it would be safe to bring in a vessel; does not think four or five miles too fast; it would depend on the tide whether the cable could be paid out to save a collision; it would have been a proper precaution to have slacked the chain of the James Gray. If the helm had been put starboard, she would have sheered to the east, clear of the Fraser, and according to the length of the chain. If the helm of the Fraser had been put port, it would have sunk the Gray. There was no means of controlling the movement of the Fraser, save by the wheel, within a distance of 40 fathoms, (unless they let go the anchor.) The result of steering the ship was to carry her in the course of the steamer. If towed, puts mate on the forecastle, to pass the word from the pilot of steamer to ship. Wheel-house of Clinch is forward part of upper deck. Bad business to attempt to see over a steamboat; depends on circumstances whether the Gray could be seen.

Cross-examined by Mr. Mitchell. Quite possible that the lamp might be like a revolving light. Steamer is in a better position to see what was proper to be done, than the ship. The pilot of the steamer is under the pilot of the ship.

In reply. Saw a light in a foreign brig, which was at anchor, the night he came in.

Capt. R. S. Parker. Knew the J. G., and where she was lying; at the mouth of a little channel, near Hog island; told the captain of the J. Gray that his anchorage was good, but that he was not in the right place. Witness told him, if he was going away in 24 hours, he need not change. If the helm of the J. Fraser had been port, instead of starboard, she would have sunk the brig. As captain of the Jas. Gray, if his helm had been midships, would starboard the helm; (qualified after, by saying that it depends on the position;) and would give her chain, but would think this rather dangerous. Signal light is a globe lamp.

Cross-examined by Mr. Memminger. Numbers of vessels lie there; (inward bound vessels lie there for a week;) would expect to find vessels in that place; if you come up at all, must have headway enough to steer; same look-out is always kept at sea, or in coming up a harbor; of a very dark night, would anchor below;

gave captain of J. Gray no positive order to move; saw him every day; did not see the Gray that night; (that afternoon she was in the same place;) she was nearer to Hog island channel than to the city; she was two-thirds of the distance; she was on the edge of the ship channel; lying north of her was a Spanish brig.

Cross-examined by Mr. Mitchell. Every captain has the port regulations given him. Supposes that the John Fraser was on the edge of the channel, so as to give her a chance to haul round. No vessels are allowed to anchor in the place where the James Gray was. Pilots are selected by the president of the board.

In reply. Sheering in the gradual inclination of the bow; would not consider it imprudent to come in, when he could see the eighth of a mile. At a flood tide, would want his head southward and westward; could not do it, unless he had gone over to the eastward. The manner in which the hawser of the John Fraser was lying, made her obey her rudder starboard, better than port. The duty of the pilot is discharged when the anchor is let go. It is the duty of the pilot of the ship to say when the towage shall cease.

By Mr. Mitchell. The towage is performed at night as well as day.

R. A. Tavel. Ship-news reporter; boarded the Fraser 5th Feb.; the night was hazy; off Southern wharf, he thought the steamer slowed off; off Adger's wharf thought the hawser was let go; the steamer slid off, and I went to her berth at Southern wharf; the Fraser was heading west. The Frazer was 500 or 600 feet off when the hawser was let go; thought there was danger of collision. There was considerable risk. Saw no light in the Gray until after the accident. Pulled off for the Gray; the mate thought she was sinking.

Cross-examined by Mr. Memminger. When he first saw them, the distance was from Magwood to Southern wharf; could see where the Gray was; the Fraser was heading due north. It was a quiet night; star-light; mate of the Gray held a light over to see. Has no impression that he saw a light before the collision; thinks there was a light in the rigging while he was looking. The light was on the port side of the vessel.

In reply. Examined the Gray a very short time; does not recollect what kind of light the mate held from the deck of the ship; could not see the Gray with the steamer between.

Charles E. Lee. Was pilot of the Fraser; never saw the Gray when the Fraser parted; Carnighan sung out, "do you see that brig?" alluding to a brig north of the Gray, which had a light. Herbest was on the forecastle; he went forward not to cast off the hawser; it had been let go. Did not give order to cast off the hawser. If the Gray had a light, would have observed it; after he got clear there was a light put up; let go his anchor five minutes

after collision; the ship's quarter did the damage. If the helm of the Gray had been starboard, less damage would have been done; short distance would have cleared her; the change of helm, and paying off the cable in the Gray, would have avoided the collision. He repeated the order of Captain Herbest, to put the wheel starboard.

Cross-examined by Mr. Memminger. Relied on Capt. Herbest seeing ahead; heard the pilot in the steamboat say "helm port;" may have changed the order afterwards; thought the port was given for the other vessel; did not see the Gray; saw the other vessel's light after the steamer had turned; gave no order to the steamboat, nor did he receive any; just followed the steamboat; the order to starboard was after that to haul in the hawser; knew from the pilot in the steamboat that the hawser was gone; took the steamer ¼ of a mile from the bar; fastened with the ship's hawser; said he wanted to go in 5 p. m. or 5½ p. m.

Cross-examined by Mr. Mitchell. Is a full branch; when on board had charge of the J. Fraser, and so continued until he dropped anchor; Herbest asked pilot of steamboat if he would steer him up and turn her round; pilot replied, that it was smoky and he was afraid to do it; this took place just before the hawser was let go; didn't see the Gray when hawser was let go; could see the steamer ahead from where he was; the steamer was on the larboard bow of ship; turned as soon as hawser was let go; steamer was distant twice the length of ship when she turned; after this, was asked if he saw the vessel ahead; said he would go in shore of her; Carnighan, just before Herbest's order, gave his order to port the helm; does not think that he remembers distinctly; feels embarrassed.

In reply. Carnighan is a full branch pilot; the steamer had the power over the ship; if the hawser had not been cast off would have done more damage.

R. C. Davis. Is a pilot; president at the time; captain has no choice; whose turn it may be, he takes charge; the pilot on the steamboat is selected by the president; Carnighan is a pilot of experience; pilot has the command of the ship until the captain takes charge; the towage ends at a limit marked by east-southeast from Southern wharf, and east-northeast from Union wharf; within those limits they are within the control of the harbor master; the towing vessel, if it carries her beyond the anchorage, acts by courtesy; this is not a proper signal light; steamboats' signal lights are dark on one side.

Cross-examined. If this lamp was properly fastened it would be as good as any other to a vessel approaching ahead; should think that it is a very fine lantern, and a great deal better than is used; it is customary for vessels to anchor in port, but not to remain there; outward-bound vessels are not allowed to remain there; would expect to find vessels in this place if he were coming in; would keep

a good look-out in approaching his anchorage; towage service is a private contract with the owner.

In reply. A light hung by a lanyard would not be good as a signal.

For the Gray, in Reply.

P. Coogan. Was present, after the collision, at a conversation between Parker and Plumer; Plumer asked Parker if he was not in a good position; Parker said he was in as good a position as if he had put him there himself; Parker explained to witness how he ascertained the position of a vessel in the harbor.

Cross-examined. Witness keeps a public house; the conversation took place there; this was soon after the collision.

In reply. Has no interest in the case; conversation referred to took place while the parties were in his house.

The case was argued on the part of the Gray by J. W. Wilkinson and C. G. Memminger, esqrs.; by Nelson Mitchell, esq., on the part of the Clinch; Alex. H. Brown and J. L. Petigru, esqrs., on the part of the John Fraser.

In the United States Court.—In Admiralty.

The JAMES GRAY
vs.
The JOHN FRASER and the STEAMER GENERAL CLINCH. } Collision.

Opinion and Decree of Judge A. G. Magrath.

The collision in this case occurred in a part of the harbor of Charleston. The James Gray, loaded with a cargo for Antwerp, had been at anchor for several days. The John Fraser was on her return voyage. The collision took place a little after seven o'clock, on the evening of the 5th February, 1856.

The rules provided for the determination of this question are framed from a consideration of the circumstances most likely to prevent collision. Whatever is likely to produce it, is prohibited: whatever is most efficient in preventing it, is enforced.

In this case there is at first some embarrassment, produced by the fact, that we have, at the same time, to consider not only different rules, as applicable to different vessels, and arising from different positions and circumstances; but these qualified by considerations affecting their operation. The rule applicable to a vessel at anchor, is affected by the anchorage being urged as improper, because of the port regulations; and the rule applicable to a vessel entering or approaching an anchorage is affected by the fact, that

the John Fraser was in charge of a pilot, and towed by a steam-vessel, the General Clinch.

A vessel at anchor is deprived of the power of motion, which a vessel with its sails possesses. As a general rule, therefore, in a collision between a sailing-vessel and one at anchor, the blame, prima facie, is cast upon the vessel with sails. But this rule is not of universal application; for circumstances will shift the burden of proof from the vessel with sails to the vessel at anchor, and deny to the latter the benefit of the prima facie presumption which has been stated. A vessel should not be anchored in the channel or thoroughfare of a river, so as to obstruct navigation, by increasing its dangers; nor be in such a position at night, without a light. Where a vessel enters a harbor in which vessels are, or may be expected, great precaution must be used; and this obligation is of course greater at night than by day. If a vessel entering a harbor collides with a vessel at anchor, and having a light, nothing short of the vis major, or inevitable accident, will excuse. In the case of the Europa, 2 E. L. and Eq. Rep. 559, Dr. Lushington thus tells us what is inevitable accident: "The import of the words, inevitable accident, is this; where a man is pursuing his lawful avocation in a lawful manner, and something occurs which no ordinary skill or caution could prevent; and as the consequence of that occurrence, an accident takes place." * * * "The test whether it is lawful or not, is this—the probability of injury to others; and this depends on circumstances."

In this case the James Gray was at anchor; but it is urged, that here the prima facie presumption of blame is not cast upon the other colliding vessel, because she was anchored in an improper place, and had no sufficient light. The anchorage is alleged to have been improper, because prohibited by the port regulations; and also that it is in the channel of the river, and part of a thoroughfare.

The port regulations provide that a vessel shall not remain at anchor more than 24 hours within certain defined limits, which embrace the place where this brig was anchored.

The difference between an anchorage, prohibited as such, which is therefore, strictly speaking, improper, and an anchorage the advantages of which one is not allowed to enjoy, beyond a certain time, must be apparent. A continuance in an anchorage of this kind may be an abuse of a privilege, so far as the port regulations are concerned; but it cannot become equivalent to an improper anchorage in the maritime sense. It may be that such an abuse of a privilege, if it occasioned inconvenience or damage to other vessels lying in that anchorage, might make the vessel affected with such abuse liable to such as could show inconvenience or damage traceable to this cause. There may be a wrongful use of a proper anchorage; or there may be an anchorage in itself improper.

That the anchorage ground of the James Gray was proper, as an anchorage, is very clear. It was always used as such, and, as such, is under the authority of the persons charged with the enforcement of the port regulations. But the brig had exceeded her privilege in being there more than 24 hours. Did this affect her anchorage, so as to visit her with the consequences resulting from an anchorage in itself improper?

However this might be in relation to other vessels at anchor, and where they had not exceeded their privilege, I cannot perceive that any such consequence arises in relation to a vessel approaching that anchorage. To such a vessel rules are prescribed, suggested by the place which the vessel is approaching, and without any distinction of vessels which may be there. If it were otherwise, we would be led to the absurdity of holding, that the same collision producing damage to two vessels by a third, under the same circumstances, might be wrongful in the one, and not so in the other. The place would lose the security which the maritime law gives it as an anchorage, and the judgment of the court would depend on the hour at which the collision occurred. What would be the rule in the 23d hour of a vessel's anchorage, would be exchanged for its opposite in the 25th hour.

I consider, then, although the James Gray had exceeded her time at this anchorage, that the place itself being a proper and lawful anchorage, she was entitled there, in case of collision with an approaching vessel, to the benefit of all such rules as would be applicable to any other vessel in that place.

Nor is it without a proper influence on this branch of the case, that with the officer who is charged with the enforcement of these port regulations, there seems to be a kind of dispensing power which may very well be regarded as necessarily incident to their proper execution. Were it otherwise, a vessel might be compelled to choose between the danger of remaining at a forbidden anchorage, and attempting to seek another at a moment of great peril. But this dispensing power very clearly shows, that these regulations constitute the authority by which the officer charged with the management of the shipping can act in any case where he feels it necessary to do so. And a strict and literal compliance with this part of the regulations is not always, perhaps not often, required. Be that as it may, it does not appear that in this case the penalty was exacted, which is provided for a violation of the regulation which limits the time of anchorage; although it is in evidence that the officer, whose duty it was to exact it, frequently saw the captain of the James Gray, and must have had other opportunities of collecting it, if he had supposed that its collection would be proper. Had this officer, in express terms, assented to the James Gray remaining in this place, I do not suppose that, at least in this case, would the legality of such permission have been questioned; nor do

I perceive any great difference between an assent in that case express and what may be implied from a knowledge of the officer of the position of the vessel and his neglect to enforce the penalty, or indicate in any other positive manner his disapprobation of the act, and his intention to have the regulation positively enforced. The presumption that a public officer has done his duty arises not only for his benefit, but for that of others to whom his relations extend.

To the objection which is made to this anchorage that it was in the channel, the thoroughfare part of a river, and therefore improper, it is sufficient to say that when this part of the harbor, either by usage or sufficient authority, became an established place of anchorage, all the rules applicable to an anchorage in a channel became inoperative. The reason of the rule which forbids an anchorage in the channel of a river, is in the fact that the channel is used for navigation, and not generally for anchorage; but whenever the whole of a channel or a part of it, by established usage or positive enactment, becomes established as an anchorage, then it is governed by the laws which protect an anchorage, and no longer is considered as it would be without this appropriation of it.

The next objection is, that the James Gray had no light; or if she had, that it was insufficient, and improperly placed. In regard to the light, the evidence before me is of the most contradictory kind. Some of the witnesses who testify in the affirmative are positive that it was habitual to have a light in the James Gray; that she did have a light the evening of the collision; that it was there before the collision took place; hung at the proper height; and after the collision, was taken down and retrimmed. In addition to this, there is the evidence of the captain and mate of another vessel, to the effect, that they saw the light before the collision, and that it was a good light.

Against this evidence, every witness from the John Fraser and the steamer General Clinch, which towed her, denies seeing the light; and this denial embraces all the time up to the collision. And their evidence is supported by Captain Thompson, who saw the vessels just before the collision, and expressed his regret that the James Gray had no light.

Is there any manner in which I can reconcile this conflicting evidence, supposing that the parties who testify against the light are to be considered as having exercised that diligence which would have enabled them to have discovered the light? I think not. For if I seek a solution for the difficulty in the position of the lantern, and suppose that its dark side was turned towards the John Fraser, while others saw its bright side; still that hypothesis fails me, in reconciling the evidence of Mr. Carr, the captain, and Mr. Tooker, the mate, of the barque Shultz; and that of Mr. Thompson, the captain of the brig Concord. These persons, about the same time, were standing on the same side of the James Gray. Mr. Thompson

saw no light, while the two others depose that they saw the light; that it was a bright light, and distinctly visible. For contradiction so positive, it is hopeless for me to attempt explanation which would reconcile it. I am, therefore, obliged to turn to that principle in evidence which directs me as to the course I shall pursue when, in a case like this, witnesses whose testimony is not impeached are placed in positive antagonism with each other. "If one witness of equal knowledge and credibility swears positively to a fact, and many swear negatively that they did not see or know the fact, the one witness swearing positively, and not contradicted, is to be believed in preference to the many." (Johnson v. The State, 14 Geo. R. 55; Purviance v. Angus, 1 Dall. R. 195; Gilbert Ev. 157.) The light may have been there, not observed by Mr. Thompson, but it could not be observed by Mr. Carr and Mr. Tooker unless it was there. And although this mode of arriving at a conclusion is far from being satisfactory, yet in some cases it must be adopted; and when adopted, the conclusion to which it leads us must in connection with all other questions depending thereupon be assumed to be as true as if reached by a process of reasoning of the most conclusive kind. I find thus established the fact of a light in the James Gray. Was it sufficient? In deciding this point I am subjected to the same embarrassment, and am relieved by the same solution to which I have referred in the consideration of the light itself. But while deciding upon the naked principle which I have stated, the question of the light and its sufficiency, it is proper for me to add, that in considering the negative testimony it would have been more satisfactory to have been better assured that they who testified against the light had exercised that close and scrutinizing observation which would have led to its discovery if it had been in the brig. I shall have occasion hereafter to examine the degree of watchfulness which was exercised. At present it will suffice for me to say that I do not discover on board of the steamer a watch or look-out kept with such constant vigilance as to make it improbable that the light might have been unobserved. For if, in such a night as it is proved to have been, when, according to the evidence of every disinterested witness, without a light the brig could have been seen at a considerable distance, she was not discovered by the persons in charge of the steamer until within a distance of forty fathoms; it may very well be, that with such a look-out a light might be in the rigging and not seen.

It is urged, however, that the evidence of those who depose that they did not see the light is supported by the kind of light which was used, and which was in a lantern partly opaque, and its dark side presented to those who were approaching. If we consider, as I am forced to do, that the light was hung up that night in the rigging of the James Gray, then the evidence of those who have been examined as to the mode in which it was fastened is wholly

satisfactory upon this point, and would be a sufficient answer to the objection now stated. They depose that it was so lashed as to make the light visible to all who approached in the same direction with the John Fraser. The mate, in his first examination, deposed that the dark side of the lantern was to the eastward, and would not be visible to a vessel approaching in that direction. But the John Fraser and the General Clinch did not approach from the eastward, but from the southward; and if the mate was correct in saying that the dark side of the lantern was to the eastward, it would go to show that the light must have been visible to a vessel approaching from the southward, if in such vessel there was a proper look-out.

It has been urged in behalf of the John Fraser, that had certain measures been adopted on board of the James Gray the John Fraser would have passed clear, and no collision would have taken place. One of the witnesses, and a very intelligent person, who was examined upon this point, gave it as his opinion, that in a similar case he would not undertake to attempt one of these modes, from his apprehension of the great danger of human life which it might involve. It would be difficult to be satisfied of the law creating a necessity for an act where such consequences were at all probable, even if the vessel previously was in fault; but certainly it can never be held that if a vessel is not in fault such an act could be required. It is true, that even if a vessel is altogether blameless, she will be expected to do whatever can be reasonably done to avoid the collision. But this duty is enforced, as it should be, according to reason. It is not because one of great energy and skill may avoid a collision by the adoption of measures executed with great promptitude and suggested by great sagacity, that another not making the same effort will be held in default. Respect is not only had to the marked differences which are exhibited among men in emergencies like this, but very ample allowance is also made for the alarm and confusion incident to an occasion where danger suddenly appearing may for the moment utterly confound and perplex. There would be little reason in allowing a party to be sheltered by that confusion which he had been instrumental in producing. I am by no means satisfied that in view of all the circumstances it would have been wise in the mate who had charge of the James Gray to have attempted at least one of the modes suggested; and if satisfied upon that point, I would still be of the opinion that his omission to do either, or both, was not such gross neglect as would be sufficient to throw the blame on the James Gray, or even to divide it with the John Fraser.

I proceed now to the consideration of the other questions in the case. Outside of the bar, the ship John Fraser was taken in tow by the steamer General Clinch; and about 7 o'clock, p. m., reached the part of the harbor in which the collision occurred. When they came around Castle Pinckney, the pilot on board of the steamer,

who supplied the place of the captain, intimated his desire to let go the hawser; but the captain of the John Fraser not being willing, he continued to tow the ship; and at last cast off the hawser, without the knowledge, as it would seem, of the captain of the John Fraser; and when, as the pilot in charge of the General Clinch admits, he had come, without any foreknowledge on his part, within forty fathoms of the James Gray. Immediately after the collision took place.

It is contended on the part of the John Fraser, that if the collision is held to create a liability, it must be devolved either upon the steamer, or the pilot who was in charge of the John Fraser.

However it may be in a court of law, where its jurisdiction is exercised in personam, in this court, where it is exercised in rem, there must be a necessity constantly present of keeping every issue presented in its plainest form. It is true that in many cases we deal with things as if they were persons; but they are cases where direct liens are operative through the maritime law, or where special legislative provision makes the thing itself liable; as in the case of forfeiture of a vessel, without conviction of the owner. I can perceive no good, and possibly mischief, in the extension of this branch of admiralty jurisdiction, so that in dealing with things, and affecting them with liabilities either direct or remote, they will serve to illustrate all the liabilities which may in any manner arise out of the various relations which their owners may bear to each other. Such an unlimited substitution of things for persons is at once suggestive of difficulties; while every advantage which may be claimed as resulting from it can be readily obtained, in proceedings which are free from all objection.

I consider that I have before me the vessel injuring and the vessel injured. And in what I have said of the James Gray, it follows, of course, that it does not matter how the John Fraser was brought into collision with her, unavoidable accident excepted. Whatever change may arise in the legal relations of captain and ship-owner on the one side, and freighter and any other person on the other, from the employment of a pilot—a matter which I shall presently discuss—it seems to me quite clear that no such change can or should occur in consequence of the employment of a towing vessel. In another part of this opinion I shall recur to this matter; but in this present connection it suffices to say, that the employment of a towing vessel does not arise from any legal requirement; nor is it undertaken for a public purpose, but is connected altogether with private considerations. The price, nature, and extent of the services which are to be rendered, are all matters of contract, determined by the parties themselves. A question may arise between the vessel towing and that which is towed, as to the manner in which the contract has been performed; but this cannot and should not embarrass or affect another vessel claiming against the vessel which is towed, damage resulting from an actual collision. And

as in this case I am not left in doubt as to the claim which will be made by the owners of the John Fraser against the owners of the General Clinch, I shall endeavor to separate that question, as far as possible, from whatever I may have to say in regard to the case before me.

The John Fraser was brought into the harbor of Charleston, and the anchorage where lay the James Gray, by a motive power, in the form of a steamboat, employed for that purpose. She thus united in herself, to a certain extent, the capabilities of a vessel with sails, and also of a vessel propelled by steam; and in the same manner, to a certain extent, became liable to the responsibilities which are attached to these two modes of navigation. I shall therefore consider whatever was done wrongly in the steamer, for the purposes of this case, as if done on board of the John Fraser.

Did, then, the John Fraser observe all the precautions which are required of a vessel entering a harbor? She entered at night, in charge of a steamer; and in such cases no rule is more positive than that which requires that there shall be a sufficient look-out; this sufficient look-out, in my opinion, was required of both ship and steamer, and should have been in both. The rule is positive in the case of the ship; imperative in the case of a steamer. Nor could that steamer have been in any position, where the observance of this rule was more necessary than in this case. She was the active agent—the motive power—leading the ship, which was passive, and could only follow. In such a case, ordinary care will not excuse; there must be "uncommon vigilance." (18 Howard R., 584.) The look-out must be "constant," and "trustworthy," "stationed in a proper place," and "actually and vigilantly employed in his duty." (12 Howard, 443.) Was there anything in the steamer which indicates an observance of these rules? If there was a look-out, who performed the duty? Where stationed? What qualifications for a place so important? If without previous experience, with what instructions was he aided? When put on duty? By whom? Where was he when the steamboat had approached within forty fathoms of the brig? If at his post, how did he account for not having sooner perceived it? If he did leave his post, how long was it that he had been absent? What caused him to be absent? And who supplied his place?

These are important questions, essential in making up a proper judgment; but of them there is no proof. It is not for me here to decide upon whom devolved the duty of having these matters attended to. Whether it was with the pilot of the ship, or the captain of the ship, or the pilot in charge of the steamer; and if with him, whether in his capacity as pilot, or resulting from the nature of the vessel in which he supplied the place of its captain; are all questions of great nicety, involving an exact discrimination of the duties and obligations which pertain to these various rela-

who supplied the place of the captain, intimated his desire to let go the hawser; but the captain of the John Fraser not being willing, he continued to tow the ship; and at last cast off the hawser, without the knowledge, as it would seem, of the captain of the John Fraser; and when, as the pilot in charge of the General Clinch admits, he had come, without any foreknowledge on his part, within forty fathoms of the James Gray. Immediately after the collision took place.

It is contended on the part of the John Fraser, that if the collision is held to create a liability, it must be devolved either upon the steamer, or the pilot who was in charge of the John Fraser.

However it may be in a court of law, where its jurisdiction is exercised in personam, in this court, where it is exercised in rem, there must be a necessity constantly present of keeping every issue presented in its plainest form. It is true that in many cases we deal with things as if they were persons; but they are cases where direct liens are operative through the maritime law, or where special legislative provision makes the thing itself liable; as in the case of forfeiture of a vessel, without conviction of the owner. I can perceive no good, and possibly mischief, in the extension of this branch of admiralty jurisdiction, so that in dealing with things, and affecting them with liabilities either direct or remote, they will serve to illustrate all the liabilities which may in any manner arise out of the various relations which their owners may bear to each other. Such an unlimited substitution of things for persons is at once suggestive of difficulties; while every advantage which may be claimed as resulting from it can be readily obtained, in proceedings which are free from all objection.

I consider that I have before me the vessel injuring and the vessel injured. And in what I have said of the James Gray, it follows, of course, that it does not matter how the John Fraser was brought into collision with her, unavoidable accident excepted. Whatever change may arise in the legal relations of captain and ship-owner on the one side, and freighter and any other person on the other, from the employment of a pilot—a matter which I shall presently discuss—it seems to me quite clear that no such change can or should occur in consequence of the employment of a towing vessel. In another part of this opinion I shall recur to this matter; but in this present connection it suffices to say, that the employment of a towing vessel does not arise from any legal requirement; nor is it undertaken for a public purpose, but is connected altogether with private considerations. The price, nature, and extent of the services which are to be rendered, are all matters of contract, determined by the parties themselves. A question may arise between the vessel towing and that which is towed, as to the manner in which the contract has been performed; but this cannot and should not embarrass or affect another vessel claiming against the vessel which is towed, damage resulting from an actual collision. And

as in this case I am not left in doubt as to the claim which will be made by the owners of the John Fraser against the owners of the General Clinch, I shall endeavor to separate that question, as far as possible, from whatever I may have to say in regard to the case before me.

The John Fraser was brought into the harbor of Charleston, and the anchorage where lay the James Gray, by a motive power, in the form of a steamboat, employed for that purpose. She thus united in herself, to a certain extent, the capabilities of a vessel with sails, and also of a vessel propelled by steam; and in the same manner, to a certain extent, became liable to the responsibilities which are attached to these two modes of navigation. I shall therefore consider whatever was done wrongly in the steamer, for the purposes of this case, as if done on board of the John Fraser.

Did, then, the John Fraser observe all the precautions which are required of a vessel entering a harbor? She entered at night, in charge of a steamer; and in such cases no rule is more positive than that which requires that there shall be a sufficient look-out; this sufficient look-out, in my opinion, was required of both ship and steamer, and should have been in both. The rule is positive in the case of the ship; imperative in the case of a steamer. Nor could that steamer have been in any position, where the observance of this rule was more necessary than in this case. She was the active agent—the motive power—leading the ship, which was passive, and could only follow. In such a case, ordinary care will not excuse; there must be "uncommon vigilance." (18 Howard R., 584.) The look-out must be "constant," and "trustworthy," "stationed in a proper place," and "actually and vigilantly employed in his duty." (12 Howard, 443.) Was there anything in the steamer which indicates an observance of these rules? If there was a look-out, who performed the duty? Where stationed? What qualifications for a place so important? If without previous experience, with what instructions was he aided? When put on duty? By whom? Where was he when the steamboat had approached within forty fathoms of the brig? If at his post, how did he account for not having sooner perceived it? If he did leave his post, how long was it that he had been absent? What caused him to be absent? And who supplied his place?

These are important questions, essential in making up a proper judgment; but of them there is no proof. It is not for me here to decide upon whom devolved the duty of having these matters attended to. Whether it was with the pilot of the ship, or the captain of the ship, or the pilot in charge of the steamer; and if with him, whether in his capacity as pilot, or resulting from the nature of the vessel in which he supplied the place of its captain; are all questions of great nicety, involving an exact discrimination of the duties and obligations which pertain to these various rela-

who supplied the place of the captain, intimated his desire to let go the hawser; but the captain of the John Fraser not being willing, he continued to tow the ship; and at last cast off the hawser, without the knowledge, as it would seem, of the captain of the John Fraser; and when, as the pilot in charge of the General Clinch admits, he had come, without any foreknowledge on his part, within forty fathoms of the James Gray. Immediately after the collision took place.

It is contended on the part of the John Fraser, that if the collision is held to create a liability, it must be devolved either upon the steamer, or the pilot who was in charge of the John Fraser.

However it may be in a court of law, where its jurisdiction is exercised in personam, in this court, where it is exercised in rem, there must be a necessity constantly present of keeping every issue presented in its plainest form. It is true that in many cases we deal with things as if they were persons; but they are cases where direct liens are operative through the maritime law, or where special legislative provision makes the thing itself liable; as in the case of forfeiture of a vessel, without conviction of the owner. I can perceive no good, and possibly mischief, in the extension of this branch of admiralty jurisdiction, so that in dealing with things, and affecting them with liabilities either direct or remote, they will serve to illustrate all the liabilities which may in any manner arise out of the various relations which their owners may bear to each other. Such an unlimited substitution of things for persons is at once suggestive of difficulties; while every advantage which may be claimed as resulting from it can be readily obtained, in proceedings which are free from all objection.

I consider that I have before me the vessel injuring and the vessel injured. And in what I have said of the James Gray, it follows, of course, that it does not matter how the John Fraser was brought into collision with her, unavoidable accident excepted. Whatever change may arise in the legal relations of captain and ship-owner on the one side, and freighter and any other person on the other, from the employment of a pilot—a matter which I shall presently discuss—it seems to me quite clear that no such change can or should occur in consequence of the employment of a towing vessel. In another part of this opinion I shall recur to this matter; but in this present connection it suffices to say, that the employment of a towing vessel does not arise from any legal requirement; nor is it undertaken for a public purpose, but is connected altogether with private considerations. The price, nature, and extent of the services which are to be rendered, are all matters of contract, determined by the parties themselves. A question may arise between the vessel towing and that which is towed, as to the manner in which the contract has been performed; but this cannot and should not embarrass or affect another vessel claiming against the vessel which is towed, damage resulting from an actual collision. And

as in this case I am not left in doubt as to the claim which will be made by the owners of the John Fraser against the owners of the General Clinch, I shall endeavor to separate that question, as far as possible, from whatever I may have to say in regard to the case before me.

The John Fraser was brought into the harbor of Charleston, and the anchorage where lay the James Gray, by a motive power, in the form of a steamboat, employed for that purpose. She thus united in herself, to a certain extent, the capabilities of a vessel with sails, and also of a vessel propelled by steam; and in the same manner, to a certain extent, became liable to the responsibilities which are attached to these two modes of navigation. I shall therefore consider whatever was done wrongly in the steamer, for the purposes of this case, as if done on board of the John Fraser.

Did, then, the John Fraser observe all the precautions which are required of a vessel entering a harbor? She entered at night, in charge of a steamer; and in such cases no rule is more positive than that which requires that there shall be a sufficient look-out; this sufficient look-out, in my opinion, was required of both ship and steamer, and should have been in both. The rule is positive in the case of the ship; imperative in the case of a steamer. Nor could that steamer have been in any position, where the observance of this rule was more necessary than in this case. She was the active agent—the motive power—leading the ship, which was passive, and could only follow. In such a case, ordinary care will not excuse; there must be "uncommon vigilance." (18 Howard R., 584.) The look-out must be "constant," and "trustworthy," "stationed in a proper place," and "actually and vigilantly employed in his duty." (12 Howard, 443.) Was there anything in the steamer which indicates an observance of these rules? If there was a look-out, who performed the duty? Where stationed? What qualifications for a place so important? If without previous experience, with what instructions was he aided? When put on duty? By whom? Where was he when the steamboat had approached within forty fathoms of the brig? If at his post, how did he account for not having sooner perceived it? If he did leave his post, how long was it that he had been absent? What caused him to be absent? And who supplied his place?

These are important questions, essential in making up a proper judgment; but of them there is no proof. It is not for me here to decide upon whom devolved the duty of having these matters attended to. Whether it was with the pilot of the ship, or the captain of the ship, or the pilot in charge of the steamer; and if with him, whether in his capacity as pilot, or resulting from the nature of the vessel in which he supplied the place of its captain; are all questions of great nicety, involving an exact discrimination of the duties and obligations which pertain to these various rela-

tions, but which are, and must be decided in another suit. From the James Gray, the steamer was perceived when she rounded the castle; by others, also, at a considerable distance—far enough to have made it easy to avoid the collision. Would not a proper look-out in the steamer have had equal power with others, to observe approaching objects? If the steamer could be seen from the brig, what prevented the brig from being seen from the steamer? It may be that the circumstances connected with the steamer were more readily calculated to arrest attention, than would any thing in the brig, except the light. But the obligation on the look-out in the steamer was stronger, and exacted more attention, than any thing connected with the steamer could excite. Whatever with vigilance might have been observed, and was not, indicates the absence of such vigilance. Then could the position of the brig have been detected with great vigilance in the look-out of the steamer? I cannot doubt it. The night was not obscure, the stars were out, and others could discern objects at a considerable distance.

The opportunity and extent of observation are very material in this case, and I will proceed to examine them more closely. "Uncommon vigilance" is the principle established. Its propriety is well illustrated in this case. The pilot who had charge of the steamer, and the John Fraser in tow, in reply to the request of the captain of the John Fraser to tow him as near as possible to Fraser's wharf, and turn him round, declares that he cannot—that he is afraid. This can only mean, that there were difficulties connected with the navigation, which made him apprehensive of some danger. It matters not whether this apprehension of danger was excited in regard to the John Fraser, and in view of her safety, or of the damage which might be done to other vessels. Either aspect reveals a conviction of danger, in the locality which he was requested to approach, and which he did afterwards approach.

His apprehension was not idle. The place was an usual and established anchorage. In it would certainly be found almost every vessel departing or arriving within the twenty-four hours preceding. A pilot must have known that vessels were usually there; and if he was in the harbor during that day, and went out for the purpose of towing in a vessel, would be presumed, in bringing the vessel to that anchorage, to know so much of its condition as could have been known at the time of this departure. He knew the vessel that, outside of the bar, waited to be towed—a vessel owned here, and whose location when in port was well understood. He brings in the ship, and what precautions are adopted in pursuance of the "uncommon vigilance" which is to be exercised? There is great room for doubt, whether a look-out in the steamer was kept at all, from the time when the first conversation took place, about casting off the hawser, up to the time when it was actually cast off. At the time when, if a proper look-out was kept,

the James Gray might have been observed, the men were employed in preparing to let go the hawser. The brig was first seen from the steamer after the hawser was parted, and seen by those who were not in the place where the look-out should be, but in the place where they would be who had to let go the hawser. Could the steamer, with a proper look-out, have come within forty fathoms of the James Gray, without its being known? A sufficient answer is found in the evidence of Mr. Thompson, who, testifying against a light in the James Gray, yet saw her that night, and at that time, from a point distant some 5 to 600 yards. Yet no one would illustrate the attention which should have been exercised in the steamer by the casual attention which a stranger, without more than ordinary curiosity, would give. And if the position of the James Gray had been known to the steamer at that distance, the collision would have been either avoided, or wilful.

I have already referred to the argument addressed to me, in which it is urged that, if there is blame, the ship John Fraser must be relieved, and the steamer General Clinch made liable directly to the James Gray. I cannot, in this case, undertake to decide upon the nature and consequences of the relations existing between the John Fraser and the General Clinch. I am to look at the thing which did the injury—that which, operating directly on the James Gray, produced damage. I will not say that a case may not arise in which I would be obliged to pass by the direct cause of damage, and recur to that which is more remote; but I will not do it in a case where a question arises of mixed blame, and where the ends of justice will be so much better served in allowing the party directly causing injury to recover over against a third person, if the real cause of the damage, although remote, such compensation as he has been decreed to render to the injured party. I am aware that the principle contended for as applicable in this case has, in the exercise of this jurisdiction, seemed to find some favor. But I should think that the consequences which can be plainly perceived in the entertainment of this doctrine, even to its present limited extent, must induce courts exercising this peculiar jurisdiction, if not to retrace their steps, certainly not to encourage applications for the extension of the doctrine. Whether the controversy before me is in the nature of a contract or a tort, I will not willingly introduce between the immediate parties third persons, whose connection with the subject-matter is produced by the act of one of the original parties, without the assent of the other. Whoever voluntarily submits himself to an agency which, naturally or otherwise, may become and does become uncontrollable by him, in its discharge of the purposes for which he has put it in motion, is its guarantor for all the damage which it may do. Whenever, therefore, the liability which one party assumes upon himself through a contract or is incurred through a tort is discharged, and the party suffering

damage is referred to some other person for compensation, it is either in consequence of a known usage of trade thus affecting the parties, or because of some positive legislative authority—but it cannot arise from the act or will of one of the parties, done or exercised without the previous assent or subsequent recognition of the other; and great as is the danger of innovations, even when considered in reference to the rights of an individual, greater does it appear when we remember that these rights, as generally understood, are reflected from great principles shadowed forth in them, and that you cannot destroy the right without at the same time destroying the principle. If, in a collision, the colliding vessel is excused, and the steamer towing held liable, the same principle would apply to the damage arising from a breach of contract, and the owner of a damaged cargo and of an injured ship would have the same reply. Yet, if there is a principle in the maritime law that is settled, it is that the vessel, by receiving his goods, becomes bound to the freighter, and is kept bound until their safe delivery; and yet, what can be more inconsistent with this principle than to allow the master or owner, without the knowledge or consent of the freighter, to introduce a new agency, becoming a new element in the contract, and operating to supersede and extinguish the original liability arising from the contract of affreightment?

But I consider this matter as concluded in the case of The Philadelphia and Reading R. R. Company vs. Derby, 14 How. 487, in which an action was brought against the company for damages resulting from a collision of trains; and the defence was that one of the engineers had put his engine on the road that day in disobedience of express orders which had been given, and which he had received. The court said: "No case which asserts the doctrine that a master is not liable for the acts of his servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master," could be found, and considered the relaxation of the rule to the point made in the defence as "highly detrimental to the public safety." O'Connel vs. Strong, Dudley, 268; Parkerson vs. Wightman, 4 Strob. 266.

But in this defence is not only involved a consideration of the duties and responsibilities of a towing vessel, but superadded to it another consideration, derived from the law which is said to govern in cases of pilotage. A pilot was in charge of the ship, and a pilot was in charge of the steamer; and a good deal of evidence and much argument was addressed to me, in the discussion of the question, whether the pilot on board of the ship or the pilot on board of the steamer was the superior, and therefore responsible, so as to absolve the captain, owner, and the vessel itself from all claim for damage occurring while he was in charge.

I cannot do better than illustrate the rule which must guide me

in this case by citing a passage from Dr. Lushington in the Eliza Cornish, 26 E. L. and Eq. 582: "It strikes me, that the law which I must seek to administer, if I am able to discover it, is the law maritime. * * Perhaps it is not possible to define it with great accuracy, because the law of almost every foreign country, in some part, differs from that of other foreign countries. * * It is intended to convey the meaning, that it is the law which is generally practiced by maritime nations. * * I must not deviate therefrom by introducing the English municipal law, unless I should happen to be compelled to do so by virtue of statutes which, of course, it is my duty to obey."

That superiority which has been assigned to the pilot, and has led not only to relieve the captain from responsibility, (which I think just,) but has been carried farther, so as to relieve the owner and ship, is not, in my judgment, warranted by the principles of the maritime law. That law is broadly distinguished in the rules it prescribes, from the rules laid down in some places by courts, and in other places provided by special enactments, in this: that it cumulates, and never diminishes, the securities for life and property.

But if I had the desire to alter the well established responsibilities which, by the maritime law, attach not only to the person of the owner, but to the vessel itself, I consider myself forbidden to do so in this court. No authority short of an act of Congress can justify my departure from the rule laid down in the maritime law. In England the exemption arises under a special statute. There is no corresponding act of Congress; such an exemption cannot arise by implication from an ordinance of the city council of Charleston; it could not be sustained if it were so expressed. The city council, acting under a delegated authority, could not do more than could the State, and the State would have no constitutional authority to make such an exemption. The pilot regulations, wherever they are found, are the acts of the States, but adopted by Congress as its own, from considerations of convenience. They are a branch of a subject which belongs exclusively to Congress. But as the States can far more conveniently, if not wisely, make these regulations, Congress has not legislated upon the subject, except by special enactments adopting the State regulations as its own, (Acts of Congress, 7th August, 1789, and 2d March, 1837.) And the marked division which existed in the Supreme Court when this matter was last considered, will satisfy all, that by that tribunal it never will be held that the action of a State affecting a principle of the maritime law, through its regulations in regard to pilotage, is proper or consistent with the acts of Congress which have been passed on this subject. (Cooley vs. Board of Wardens of Philadelphia, 12 How., 300.) In this view of the matter it is not necessary for me to consider how far the several acts of Congress, considered as a

delegation of its authority to the States, is or is not adequately exercised through the action of a municipal corporation. And without the constitutional difficulties, to some of which I have referred, it must be obvious to all, that if the principle which should govern in a case like this becomes dependant upon the various action of the different States, we might have as many rules as States.

But it is not only that I am not authorized by any act of Congress to admit this exemption. I consider that Congress has refused to recognise this exemption when it undertook, as it did by its act of 3d March, 1851, to define the limit of the owner's liability. In that act, following the rule laid down in the marine ordinances of France, it provides, that in certain cases, in which collision is included, the owner shall not be held liable for more than the value of his interest in the vessel, and the freight then pending, where the loss was incurred without his privity or knowledge. And by the surrender of that interest the owner may avoid all personal liability. Nothing can be more clear than that Congress, by this act, expressed its purpose in relation to the exemption of the owner's responsibility. It looks to the thing—deals with the res—and measures the liability of the owner by the interest he has in the vessel and freight. If the intervention of a pilot, or other circumstance, was considered as justifying the exemption, it would have been so expressed. But in place of it we find a point established beyond which the owner cannot be made liable; but in all other respects his liability is left unaffected by any provision limiting or controlling the application of the principles of the maritime law so far as it can operate.

The decree will be in conformity with this opinion; and the James Gray will be held entitled to recover against the John Fraser the amount expended for repairs rendered necessary in consequence of the collision, as well as the amount of the claim made for demurrage. (Williamson vs. Barrett, 13 How., 101.)

And it is further ordered, that the libel, as to the steamer Gen'l Clinch, be dismissed with costs.

A. G. MAGRATH.

19th Jan., 1857.

Decree.

The JAMES GRAY
vs.
The JOHN FRASER and
the GENERAL CLINCH.

This case came up to be heard on the pleadings and evidence, and, after consideration of the same, it is ordered, adjudged and decreed, that the James Gray recover against the said ship John

Fraser three thousand nine hundred and two dollars sixty-seven cents, paid for repairs to the said James Gray; and also the further sum of two thousand three hundred and sixty dollars for demurrage, together with her costs in this case.

A. G. MAGRATH.

21st Jan'y, 1857.

It is agreed by counsel in this cause that the sum of $2,360, decreed for demurrage in this cause, is the amount of demurrage given in evidence in the case.

MEMMINGER, JERVEY & WILKINSON,
BROWN & PORTER,
NELSON MITCHELL.

UNITED STATES OF AMERICA,
South Carolina District.

The OWNERS OF THE SHIP JOHN FRASER
vs.
The OWNERS OF THE BRIG JAMES GRAY, and the OWNERS OF THE STEAMER GENERAL CLINCH.
} Petition of Appeal to the Circuit Court.

To the Hon. James M. Wayne, one of the Associate Justices of the Supreme Court, &c.

The petition of , owners of the ship John Fraser, respectfully showeth, that their ship, the John Fraser, was libelled, along with the steamer General Clinch, in the district court for this district, by the owners of the brig James Gray, for a collision which occurred between the John Fraser and the brig James Gray, the ship John Fraser then being towed into port by the steamer General Clinch; and on the 21st January instant, a decree was pronounced in the said court, by his honor Judge Magrath, condemning the John Fraser for damages and demurrage sustained by the brig James Gray.

Your petitioners therefore appeal from the said decree, and pray that the said cause may be re-heard, and the said decree reversed, and that your petitioners may receive such further and other relief in the premises as to your honor may seem meet; and your petitioners will ever pray, &c.

BROWN & PORTER,
Proctors for ship John Fraser.

UNITED STATES OF AMERICA,
South Carolina District.

In Admiralty.

The OWNERS OF THE BRIG JAMES GRAY vs. The OWNERS OF THE SHIP JOHN FRASER, and the STEAMER GENERAL CLINCH.	Petition of Appeal to the Circuit Court.

The petition of William Cushing, John N. Cushing, and Caleb Cushing, of Newburyport, in the State of Massachusetts, owners of the brig James Gray, whereof Charles H. Plumer is master, respectfully showeth: That on the day of January last, a decree was pronounced by his honor Judge Magrath, in the district court holding admiralty jurisdiction, condemning the owners of the John Frazer for damages in the sum of three thousand nine hundred and two $\frac{61}{100}$ dollars, and in the further sum of two thousand three hundred and sixty dollars for demurrage, and ordering that the libel as against the master and owners of the General Clinch be dismissed.

That a petition of appeal against the said decree has been filed and allowed to the master and owners of the ship John Frazer to reverse the said decree, and that your petitioners desire, upon the hearing of the cause before the circuit court, to have the benefit of their libel as well against the steamer General Clinch as against the John Frazer.

Wherefore your petitioners pray that an appeal may be allowed them to the circuit court as to so much of the decree as dismisses the libel against the General Clinch, and that a decree may be made ordering the said steamer, and the ship John Fraser, or one of them, to pay the amount claimed in the libel of your petitioners.

MEMMINGER, JERVEY & WILKINSON,
For Libellants.

UNITED STATES OF AMERICA,
South Carolina District.

In the Circuit Court—On appeal from the District Court.

MONDAY, *4th May*, 1857.

The court met, &c. Present, his honor J. M. Wayne.

The OWNERS OF THE BRIG JAMES GRAY vs. The SHIP JOHN FRASER and the STEAMER GEN'L CLINCH.

Mr. A. H. Brown read the libel and answers in this case, and the testimony taken in the district court.

The following witnesses were sworn and examined, viz: Capt. Parker, Capt. Turner, and J. Carnighan. (See their testimony, post, fo. .)

TUESDAY, 5 *May*, 1857.

Present, his honor J. M. Wayne.

Mr. Jervey read the decree of the district court in this case.

Mr. Brown was heard for the appellants, the owners of the ship John Fraser.

WEDNESDAY, 6*th May*, 1857.

Present, his honor J. M. Wayne.

Mr. Memminger was heard for the libellants. Mr. Mitchell was heard on the part of the steamer Gen'l Glinch.

THURSDAY, 7*th May*, 1857.

Present, his honor J. M. Wayne.

Mr. Petigru was heard in reply, for the owners of the ship John Fraser.

Testimony in Circuit Court.

The BRIG JAMES GRAY
vs.
The SHIP JOHN FRASER and the STEAMER GEN'L CLINCH.

MAY 4*th*, 1857.

Capt. R. S. Parker, sworn. Is assistant harbor-master of Charleston; remembers the collision of the James Gray and the John Fraser; knows where the Gray was lying; took particular notice before the collision. Those parts of the river northeast from Fitzimon's wharf, and southeast from Southern wharf, are out of the proper limits. The James Gray was in the interdicted spot; she lay there three or four days—may have been longer. After Capt. Plumer had anchored there, he asked witness if he saw where he was anchored, and what he thought of it? He told him it was good anchorage, good holding-ground, but in the limits of the city. Witness called to Capt. P.'s notice article No. 1 of ordinances; also article No. 2. (See post, fo. 76.) The day he hauled into the stream, Capt. P. said he was going to sail next day, and had come ashore to see about his men; saw him afterwards, but not to speak to him; did not report him, as he was then very busy, and he overlooked the matter; he saw Capt. P. after the collision; he supplied Capt. P. with a copy of these reglations.

Capt. Parker X-examined by Mr. Memminger. This place where the Gray lay was the usual anchorage ground for vessels going out

for twenty-four hours' time. If he were a captain bringing a vessel in, he would expect to find vessels at anchor there; he did not order Capt. P. away from this ground in so many words—he referred him to the regulations.

R. S. PARKER.

Sworn to.

H. Y. GRAY, *Clerk.*

Capt. S. Turner, of steamship Jame Adger, sworn on the part of the John Fraser. Knows nothing about this collision; never heard of it till this morning. A vessel at anchor should have a signal light open to all points of the compass. The fore swifture is the forward rope leading from the head of the mast to the side of the ship; don't know how this lantern could be fastened to the fore swifture by a lanyard without its cracking from the flame: an earring is a small rope: this lantern is not enough for a signal lamp; if the opaque side were turned to the eastward, it would not be a signal for vessels coming in.

1. If the Gray were lying with her head to the west of south, and the Frazer approached her on the starboard bow within fifty yards, towing the hawser out of the larboard port hole, which side would you put the helm (of the ship)?

Ans. To the larboard or port side.

2. It being flood tide, and the Gray lying at single anchor, and the Frazer heading on, towing her hawser from the port hawse-hole, which way would you put the helm (of the ship) to avoid the collision?

Ans. Starboard.

When vessels are in danger of collision and one is at anchor, the one at anchor can change her position by use of the helm, either side, may be some 40 or 50 feet; she also might change her position by paying out her cable; it appears that the main topgallant back-stay of the Frazer caught the flying jib-boom end of the Jas. Gray; so that a slight variation of the helm of the Gray would have cleared them; thinks she might have cleared either by moving her helm, or giving more rope.

X-examined by Mr. Memminger. If the vessel was coming head on, and he was captain of the Gray, and heard contradictory orders from the vessel approaching, one "port your helm," and one "helm a-starboard," he, in the Gray, would not know how to put his helm until her bow had passed; a man in the Gray paying out cable when a collision was just expected, would be in danger of injury or of his life. After rounding the castle coming in, his course would be north, may be a little west; such a lantern as this he would fix with the dark side to the northeast for a signal to vessels coming in or coming down the river; this is a small lamp; the globe

lamps are of different sizes; there would be no difficulty of lashing this lantern by a cord through the rings at the side, and by the top.

Examined by Mr. Mitchell. If he had been towed in by a steamer, and certain orders had been given from the steamer, he would have listened to them, but would guide himself rather by his own judgment; the pilot of the steamer is not always in command of both vessels.

Examined in reply. If the opaque side were turned to the east at flood-tide, at ebb-tide the opaque side would be to the west. In case of an expected collision, if the order from the steamer were contrary to his judgment, he would not mind it.

A ship like the Frazer being suddenly left by the steamer which towed her, would not stop in her course immediately, even if she threw out her anchor. The captain on the topgallant forecastle in the ship would have a better place to look around and look out than the pilot in the steamer towing her.

If the steamer were right ahead towing her with about 45 fathoms of cable, they would not be able to see an impediment through the steamer well. The most advantageous place for a look-out on the deck of a ship, is the topgallant forecastle. * * This is a bowsprit lantern; it is put on the cap of the bowsprit.

X-examined by Mr. Memminger. A look-out is very important; when coming into harbor they have no special look-out; everybody is on the look-out. They never appoint on such occasion a special look-out; this is the general custom; there are always at this time half a dozen people on the topgallant forecastle; it is understood that they are to look out, whether he gives them directions to look out or not.

S. TURNER.

Sworn to. H. Y. GRAY, *Clerk.*

Captain Carnigan sworn, (on the part of the Clinch.) When he took charge of the Frazer, was on the wheel-house all the time; this is the highest place and the most forward in the boat for a look-out. Three of the hands were aft, and two forward, looking out; (had orders to do so.) Two were white men, three negroes, a full complement for such a boat; he stayed at that post till the hawsers were let go; he then turned off west to the city; after he turned the steamer, he saw the Gray; she had no light; he had just time to walk from the bow to the aft part of the steamer, when he saw the Gray, and he asked the pilot of the ship if he saw that vessel, and he said yes; he was going to the east of her; and witness told him he had better put his helm to port; and he heard the pilot of the ship say to the man at the wheel "port your wheel;" and almost im-

mediately Captain Herbest cried out, "hard a-starboard your wheel."

We passed between two ships with lights; they were not 200 yards apart. We saw the lights a quarter of a mile off. If the Gray had had a light, he could have seen it soon after passing the ships. When he turned off towards town the Gray must have been 40 or 50 fathoms off; if he had seen her twice that distance off, they would have escaped collision altogether. He thinks if the ship's helm had put a-port when the order was given she would have passed clear. Has been a pilot since 1838. Does not think that a proper signal lantern; a globe lamp is the proper one in the harbor; these are used at sea, and fixed to the bowsprit.

The orders given aboard the steamer that night were all obeyed.

X-examined by Mr. Memminger. He is not the regular captain of the steamer; he believes the names of the two white men of the crew are Sullivan and Cannon. This lantern has a reflector; when you can see this light it is brighter than a globe lamp.

The place where the Gray was anchored was a common anchoring ground; very few anchor so far over as that. She could not have lain more in the centre of the stream than she did if they had tried. When coming in or going out, he expects to see vessels about there. He saw her there some days before. He expects no danger to himself in this case, because it is hard to get blood from a stone.

X-examined by Mr. Brown. He was in the pilot-house of the steamer. He saw a vessel higher up the stream than the Gray; she had a light; she was north of Fitzimon's wharf. Frazer's wharf, where the J. Frazer is wont to lie, is two wharves south of Fitzimon's. The course of a vessel coming in with flood tide is north, and she, in order to anchor, must round to and get her head to the south. The Frazer could not round to and anchor as she did without going well over to the eastward. It is not often that an outward bound vessel anchors where the Gray lay; an inward bound vessel, before hauling into the wharf, usually anchors there first. Has not seen an outward vessel lying there, to his knowledge, since the Gray. Outward bound vessels usually anchor down near the battery. * * When Captain Herbest gave the order hard a-starboard, he was nearer the Gray than witness ever was that night. There was room on either side of the Gray for a ship to pass.

If the hawser were under the vessel, don't think it would affect her steering; but if it were at an angle from the port-hole, she would come more readily to the port side.

Before Captain Herbest said hard a-starboard he sung out to us to hold on to the hawser, and I said it is too late. If he had not headed to the west, he should have been run over by the ship.

Sullivan and Cannon were not look-outs just before the collision; two black men were forward, and there was a man at the wheel. There is no great occasion for a look-out in a vessel towed in by a steamer; a man on the topgallant forecastle couldn't see much with the steamer in front. When a vessel is coming into the harbor, all hands on the forecastle are ordered to keep a look-out.

Examined by the Court. When he cast off the hawser, he was 40 or 50 fathoms from the Gray; when the hawser was tight, the ship was some 50 fathoms from us. The night was hazy. He never saw the Gray till he let go the hawser; the Fraser's wharf was some four or five wharves higher up; the captain of the Fraser wanted to be towed up there, but witness refused; when he let go the hawser they were opposite a wharf, some 400 or 500 feet lower down than Fraser's.

(Signed) R. CARNIGHAN.

Sworn to. H. Y. GRAY, *Clerk.*

Extracts from Ordinance to establish Regulations for the Port of Charleston, ratified September 2, 1840.

Sec. 1. *Be it ordained*, That all vessels in the harbor of Charleston shall hereafter be subject to the following regulations, i. e.—

1. No vessel shall be permitted to remain in the stream opposite the city, whether inward or outward bound, for a longer period than twenty-four hours; at the expiration of which time, every such vessel must be removed, unless coming immediately into dock, and properly moored in a direction northeastwardly from Fitzimon's wharf, or southwestwardly from Southern wharf, so as not to incommode or prevent the approach to or departure from the wharves and docks of other vessels.

2. No vessel anchoring in any part of the river within a mile of the city, shall remain at single anchor or unmoored, at any time, for a longer period than 24 hours; and every vessel anchored in the stream must be at least fifty fathoms from the uttermost vessel, lying at the head of the nearest wharf, when she swings in next the city. * * * * * * *

No. 2, sec. 2. Every master, commander or owner of a vessel, refusing or neglecting to comply with any of the foregoing regulations, or any part thereof, shall forfeit and pay to the use of the city the sum of twenty dollars with costs, for the first day or first offence; and the further sum of fifty dollars with costs for every subsequent day on which he so refuses or neglects to comply with any such regulations, or any part thereof, besides being liable for all expenses and damages caused by such refusal or neglect. * *

Extract from Ordinance of city of Charleston, ratified May 13, 1852.

Sec. 1. *Be it ordained, &c.*, That, hereafter, every ship, vessel and steamer, lying and being within the harbor and port of Charleston, (unless the same be lying in one of the docks or be moored to a wharf,) shall be, and the same is, required to have and keep a light burning on board thereof from dark until daylight; the said light to be suspended conspicuously midships, twenty feet above the deck of said vessel; and the master, owner, or other person having charge of any ship, vessel or steamer, making default herein, shall be liable to a penalty of twenty-five dollars for every such offence, to be recovered for the use of the city, in any court of competent jurisdiction.

Judge Wayne's Opinion, delivered 1st June, 1857.

Circuit decision.—U. S. A., South Carolina district, in Admiralty.

On appeal from the district court.—The owners of the brig "James Gray" vs. The ship John Fraser and the steamer Gen. Clinch.—Libel collision.—Judgment.

Circuit opinion by Wayne, J.:

It will often occur, when new testimony is taken in an appellate court upon the subject-matter in controversy, that its merits are so differently disclosed from what they had been before, as to make it necessary to change or modify the judgment appealed from. It is so in this case; for, though I concur in the dismissal of the libel against the steamer, there being no evidence under the circumstances of the whole case to make her answerable, I cannot do so in the decree given against the ship John Fraser, believing, from the evidence taken before me, in connexion with that upon which the case was tried in the district court, that the libellants have no cause of complaint against her, and that she is in no wise responsible in admiralty for any injury sustained by the brig James Gray from the collision between those vessels.

The libellants allege that their brig, the James Gray, was in the port of Charleston, destined on a voyage to Antwerp, with a full cargo on board, to the value of —— dollars or thereabouts; that she was a staunch and well built vessel, of the burthen of three hundred tons, completely rigged and provided with tackle, apparel, and furniture, and then had on board and in her service —— mariners or thereabouts, which was a full complement to navigate her on her destined voyage. That on the 1st February, 1856, she left the dock at which she had taken in her cargo, in the prosecution of her voyage, and was hauled out into the stream of Cooper river, or harbor of Charleston, and was anchored on the opposite

side of the river as far as she could safely go, more than one hundred fathoms from any of the docks or wharves of Charleston; and that she remained there until the evening of the 5th, waiting for such arrangements to be made as were necessary, and a favorable opportunity to sail. It is then averred that on that evening, as soon as it was dark, or about half-past six o'clock, a light in a large bowsprit lantern was hung with an ear-ring on the brig's port fore swifture; that it was distinctly visible, and was so at the happening of the collision between the John Fraser and the James Gray; that about seven o'clock, the second mate of the brig having then the forward watch, observed a ship in tow of a steamer coming up the river with great headway towards the brig, and that he and other mariners on board of her shouted to the steamer and ship to keep clear, which they might easily have done if they had been sufficiently careful; but they were not so, but kept on their course, with steam and tide, and ran the John Fraser across the bow of the James Gray; and while crossing, ran foul and on board of her, carrying away her jib-boom, bowsprit, and cutwater; also her forward and fore rigging, and tearing up her plank-sheer, and covering-board; and that all this was done by the ship and steamer, while the James Gray, being at anchor, could not get out of their way, and although there was room enough for the steamer and ship to pass the James Gray on either side of her, the brig's light being then distinctly visible, and hanging in her fore rigging according to the usual custom of the port of Charleston. It is then repeated in the 3d article of the libel that it was impossible for the James Gray to get out of the way of the John Fraser, because the James Gray was at anchor with a flood tide running, and that there was room enough for the John Fraser and the steamer towing her to steer clear of and pass by the James Gray without doing any damage whatever.

It is also alleged that there was a pilot on board of the John Fraser and another on board the steamer, and that the collision and damage to the James Gray would not have happened if a proper look-out had been kept by the masters, pilots, and crews of the ship and steamer.

They also allege that the injury sustained by the James Gray could not be repaired for less than three thousand dollars, and that other expenses to be incurred, resulting from the collision, might be estimated at twenty-five hundred dollars.

The respondents answered severally—they admit the collision between the John Fraser and the James Gray; in part contesting the injury done to the latter. But they say it was owing to the captain of the James Gray having kept her at anchor where she was first anchored when hauled out from the dock three days longer than the 24 hours she was permitted to lie there, in violation of the laws and port regulations of the city of Charleston. They also

aver that the James Gray was not at any time anchored and moored in the stream, as those regulations require outward or inward bound vessels to be; and besides, that the collision was caused by improper neglect on the part of the James Gray, in not having a proper light in her rigging after dark, as the ordinance of the city and its port regulations require. Indeed, that she had no light at the time of the collision; or that if she had a light, it was insufficient from the kind of lantern used, and from its having been hung on the port fore swifture of the forward lower rigging, instead of having been suspended at a proper elevation midships, as the ordinance of Charleston directs.

The respondents for the steamer aver that her towage of the John Fraser was well and faithfully done in every particular, including casting off the towing hawsers at the time and place it was done, it being within the limits where towage of upward bound vessels may be discontinued, and the ship having then headway enough, with the flood tide, to take her without the use of her sails to the point of anchorage where she wished to lie, to be most easily hauled into dock. And the respondents for the steamer add, that if the collision was owing to any other cause than the neglect of the master and crew of the James Gray, it was owing to the master and crew of the ship John Fraser, which was alone to be condemned for the same.

Captain Herbest, the respondent for the John Fraser, answers, that the allegations in the first article of the libel, that the James Gray had a complement of hands to navigate her on her voyage when she was hauled from the dock into the stream, is not true; and that there were not on board of her, at the time of the collision, a sufficient number of seamen to aid in preventing it, or to render the necessary assistance under the circumstances. After giving a narrative of the towing of his ship, not differing from that of the respondents of the steamer, he declared that the James Gray had not a light suspended previous to or at the time of the collision; that the first time he saw the James Gray was after his towing hawser had been cast off by the steamer, when the ship was under good headway; that his attention was called to her by an inquiry from the pilot of the steamer of his pilot whether he saw that vessel, the former saying, at the same time, your hawsers are gone, port your helm; that, not thinking it was a proper direction in such an exigency, and in the condition of the ship, he ordered the wheel hard starboard, with the hope of rounding to the ship, but that the ship and brig were then so near each other as to render a collision inevitable, and the starboard swifture of the ship being about midships, caught the jib-boom end of the brig and carried it away. He further alleges to the 3d article of the libellants' complaint, that before and at the time of the collision he was, with most of his crew, in and about the topgallant forecastle of the ship, in the

best possible position either to discern or avoid any obstacle in the course; and that he heard no other hail or caution than that given by the pilot of the steamer, simultaneous with the notice that the hawsers had been cast off. The foregoing statement from the libel and the answers of respondents is sufficient for the decision of the case. It raises several points for consideration.

The first of them is, whether the James Gray, at the time of the collision, was rightfully at anchor at the place where she is represented to have been by the libellants, and where the evidence shows her to have been.

The ordinance of the city of Charleston to establish regulations for the port and harbor of Charleston, ratified on the 2d September, 1840, (City Ordinances 104, 105) declares that "no vessel shall be permitted to remain in the stream opposite the city, whether inward or outward bound, for a longer period than twenty-four hours, (at the expiration of which every vessel must be removed, unless coming immediately into the dock,) and be properly moored in a direction northeastwardly from Fitzimon's wharf or southwestwardly from Southern wharf, so as not to incommode or prevent the approach to or departure from the wharves and docks of other vessels.

The 2d paragraph of the ordinance is, that "no vessel anchoring in any part of the river, within a mile of the city, shall remain at single anchor, or unmoored, for a longer period than twenty-four hours; and every vessel anchored in the stream must be at least fifty fathoms from the outermost vessel lying at the head of the nearest wharf when she swings in next the city—and the ordinance as well as the port regulations require that vessels so anchoring shall, at night, show a good light.

The allegation of the libellant is, that the James Gray, in the prosecution of her voyage, was hauled out into the stream of Cooper river, in the harbor of Charleston, and anchored on the opposite side of the river, on 1st February, 1856, and that she remained there until the evening of the 5th February, when the collision happened. In other words, the libellants admit that their vessel was allowed by her captain to be at anchor for more than three days in that part of the stream in which vessels, either inward or outward bound, are not permitted to remain for a longer period than twenty-four hours. And the testimony of Parker, the assistant harbor-master, is, that this was not ignorantly done by her captain; for though he had told Captain Plummer that his anchorage was good, he had warned him it was not in the right place, adding, if he was going away in twenty-four hours he need not change, but that the James Gray was in the interdicted spot.

This witness says he knows where the James Gray was lying—took particular notice before the collision; that she was in the interdicted spot, and lay there three or four days—may have been

longer; that after Captain Plummer had anchored there, he asked witness if he saw where he was anchored, and what he thought of it; that he told him it was good anchorage, good holding ground, but in the limits of the city, and witness called Capt. Plummer's attention to articles Nos. 1 and 2 of the ordinance.

That the day Capt. Plummer hauled into the stream, he said he was going to sail the next day, and had come ashore to see about his men. The witness goes on to state that he saw Capt. Plummer afterwards, but not to speak to him; that he did not report him for remaining where his brig was at anchor, for he was then very busy and he overlooked the matter. In the cross-examination of this witness by Mr. Memminger, he answered, the place where the James Gray lay was the usual anchorage ground for vessels coming in and going out, for twenty-four hours' time. He did not order Capt. Plummer from this ground in so many words; he referred him to the regulations. It was also said by him, were he a captain bringing in a vessel, he would expect to find vessels at anchor there. The testimony by Parker has been given only so far as bears upon the locality of the James Gray, being at anchor, which, however, is not qualified by any of the rest of it.

It having then been ascertained that the James Gray was at anchor, at the time of the collision, where she was not permitted to be by the ordinance of the city, I will now state what the admiralty rule is in cases of collision with a vessel anchored in an improper place; first stating what, in admiralty, is considered an improper place. It may be a thoroughfare, or pass of a river, or a channel of a river, or the channel over a bar leading into a river, bay, roadstead, port or harbor, or any particular part of a stream in a port or harbor which is prohibited by law or by harbor regulations, or without being prohibited by law, where, from the commerce of the place and passing of vessels, the likelihood of collision between them is increased by vessels anchoring there, or when, from vessels anchoring there, the ingress and egress to and from the wharves and docks of a city may be interfered with. Nor can a forced anchorage, in either of the places which have been mentioned, by an exigency or marine peril, be extended beyond the necessity for it; if it be, and a collision take place by a vessel entering the harbor, the vessel at anchor will be considered in fault. And it is always a fault, in a maritime sense, for a vessel to be kept at anchor, in a port or harbor, longer than she is permitted to be for the purpose of making her last preparations for her departure, or for such as may be necessary for wharfing or docking one which has just arrived.

And it is well here to observe that it cannot be claimed for a vessel at anchor in an improper place, that she was at anchor and could not get out of the way of a colliding vessel; nor can a vessel so situated claim the benefit of that principle of the maritime law,

that if a vessel be at anchor, with no sails set, in a proper place for anchoring, and another ship under sail does her an injury, the latter is presumptively liable.

In all these cases of vessels at anchor in an improper place, the maritime rule is that the owners of the vessels injured must abide the consequences of the misconduct or negligence of the master placing or keeping her there. This rule operates in all cases, except when the collision has been wanton or aggressive, which has frequently been done by large vessels to the smaller craft of navigation; and there is but one partial exception from it, and that is when the colliding vessel has been so mismanaged that it amounts to a fault, which makes it equitable that she should share the loss, it being an established principle, in cases of collision, that the fault of one vessel will not excuse any want of care, diligence, or skill in another, so as to exempt the latter from sharing a loss caused by it. I understand the rule and the exceptions, as I have stated them, to be the meaning and effect of the decision of the Supreme Court of the United States in the case of Strout & Flemingway, in 1 Howard, 59. The same point is ably and learnedly discussed by Judge Ware, with the same conclusions, in the case of the Scioto, Dance's Reports, 389.

Wilful collision is not pretended in this case. It is, then, inconsistent with the rule that the ship John Fraser should have been made to pay the whole loss resulting from this collision.

Can she be made to share it? I think not, from the evidence. The charge is, the steamer and the ship had not kept, in either, a proper look-out; that the Gray's light was disregarded, and that there was room enough in the channel for both the steamer and the ship to have passed on either side of the James Gray. There is neither allegation nor proof in the case that the steamer had not done her towage of the ship skilfully up to the time when she cast off the ship's hawsers. Nor is it charged or proved that the ship while towed astern by the General Clinch had not regarded all the signals, and obeyed every order given by the steamer. The only imputation of blame upon the ship, besides that of not having kept a good look-out, is, that when she was cast off by the steamer she had put her helm a-starboard instead of porting it, by which it is said the collision might have been prevented. As to the first, the proof is that the ship had the customary look-out of a vessel coming into port; that is, all hands on the look-out, and not a special person for that purpose, as is the case when a vessel is at sea. A vessel entering into port is always to be supposed in greater danger of collision, and experience having shown it to be so, the vigilance must be increased to avoid a collision, and the look-out at such a time must be made the duty of her whole crew and officers, and not be trusted to a single person. If the custom were neglected, it

would be thought a want of vigilance. At such a time all the crew are ordered upon deck—some of them stationed on the topgallant forecastle, with orders to them especially, and to the rest also, to keep a look-out. And then captain and officers are on deck with them for the same purpose, and for their other duties, as the occasion may call for or order.

I am satisfied as to the correctness of this difference, and that if the occasion did not call for its recognition in distinct terms, it is not at all at variance with what was said by the court concerning a look-out in the Genesee Chief. 12 How., 233.

The difference is sustained by the evidence of Captain Turner, of the steamer James Adger, a seaman and navigator otherwise, of long experience; and Carnigan, a full branch pilot out of the port of Charleston, constantly in the habit of piloting vessels into and out of the harbor, confirms it.

The proof in the case is, that the John Fraser had such a look-out as she was bound to have when coming into port—Reed, Oscar Scott, and Cameron, prove it.

It is not denied by any witness of the libellants, nor made in any degree doubtful by any other witness. I shall regard it therefore as a fixed fact, that her collision with the James Gray was not caused by any want of vigilance in respect to a look-out.

The steamer, too, is said by Carnigan to have had a proper look-out. It has not been disproved by the libellants, or made doubtful by any evidence in the case.

In noticing the next position of the libellants, that the collision would not have occurred if the helm of the John Fraser had not been put hard a-starboard after her hawsers had been cast off, my first remark is, that the order was given by Capt. Herbest, with the concurrence of his pilot. Lea, the pilot, says he repeated the order of the captain to put the wheel hard a-starboard, and relied upon his seeing best ahead. He heard the pilot in the steamer say helm a-port, but thought it was meant for the other vessel. Carnigan, however, says it was not, and he thinks had the helm of the Fraser been put a-port when he cried to the ship, that she would have passed clear of the James Gray. But besides giving no nautical reason for the opinion, other witnesses do not agree with him. McNorton, the second mate of the James Gray, thinks that the order to port the helm was wrong, if it was meant for the ship; and that if she had kept the same course she had when the order to haul in the hawser was given, she would have come into the larboard side of the fore rigging of the James Gray; but that she luffed up, and there was not more than from three to five minutes between the order to port the helm and the collision. But we are not at a loss to account for the causes of this starboard movement. All of the witnesses agree that a collision was impending between the ship and the James Gray from the moment that the former was cast off

by the steamer. The ship then being not more than two hundred yards from the James Gray, with headway upon her, from her towage and from a flood-tide, and with her hawser still in the water from her larboard hawse-hole, it was likely that she would answer her helm more readily by a starboard turn of the wheel than by porting it. And the event proved it to be so, for had the James Gray's helm, though she was at anchor, been turned at the same moment, the collision might have been avoided. Captain Turner, of the steamship James Adger, gave his testimony with much intelligence upon this point. He says, it being a flood-tide, and the James Gray lying at single anchor, and the John Fraser heading on, towing her hawser from the port hawse-hole, I would have put the helm starboard to avoid the collision. The order, then, was neither an error nor a fault; but had it been the first, it would not have made the John Fraser responsible for the loss, for when a vessel has been placed in a sudden peril, not by its own error, upon the alarm of the moment, when there is no time for thought, an order is given not so fortunate as another may have been, she is not responsible for an error committed under such circumstances; it is not a fault. Genesee Chief, 12 Howard, 245.

It was also earnestly urged on the argument that the James Gray had a light, which ought to have been observed by the steamer and the ship; but her having a light at all was denied by the counsel of the respondents, and it was also contended by them, if any light was put up it was insufficient from the kind of lantern which was used from that part of the rigging of the James Gray in which it was suspended, and from the manner in which it was hung there.

Notwithstanding the conflict of testimony as to the fact of a light having been hung up at the time, and in the manner it is said to have been done, the weight of the evidence is in favor of it; but I am convinced by it also that it was insufficient and improperly placed. It was not that good light which the ordinance and port regulations meant that vessels should have at night when moored in the harbor. By a good light is meant one of a kind so placed that it may be a warning at all times of tide to approaching vessels from any direction; the lantern used in this instance was a triangular bowsprit lantern, with one of the sides opaque, made to be put on the cap of the bowsprit, and from the evidence I am obliged to conclude, so uncertainly hung and lashed to the fore swifture that it did not probably, with the aid of its reflector, radiate its light either constantly forward of the brig, or in any one direction at all times so as to be seen by vessels entering the harbor, from the courses they are obliged to steer from the bar to the city. It was not a signal light, open to all points of the compass as a globe lantern would have been, suspended midships, at a proper eleva-

tion. Had such a light been suspended, it would have been seen by the steamer, as all the lights of other vessels were, on her way from the bar, and as the light of a vessel was which was higher up the river than where the James Gray was at anchor.

All of the witnesses for the respondents swear that they did not see any light on board of the James Gray. Each witness, who swears that no light was visible, was as well placed to see it as any one of them who says that he did. Capt. Thompson, of the brig Clinton, who was well placed to see the James Gray, just preceding the time of collision, and who did see it, says he saw no light in the rigging of the James Gray, but he saw lights passing about her deck upon the collision. The first and second mates of the ship Royal Victoria, equally as well situated as Captain Thompson was, and as disinterested, saw the light on board of the James Gray preceding the collision. Captain Carr, of the Henry Shultz, saw the light of the James Gray between six and seven o'clock, and says it was as good as it could be. But he did not witness the collision, and speaks of the position of the vessels just before it. Indeed, Thompson is the only witness unattached to the ship, the steamer, or the James Gray, who saw the collision, and who speaks of the light at that moment. No other witness differs from him except the first and second mates, and a seaman of the James Gray.

This conflict between the witnesses concerning the visibility of the light, cannot altogether be satisfactorily reconciled. Their differences, however, may be reasonably accounted for from the kind of lantern in which the light was, from its having been suspended in an improper place, and from its not having been so securely fastened as at all times to give a steady light in one direction; and the deficiencies just mentioned may be more relied upon, because the witnesses of the libellant give an imperfect account of the manner in which the lantern was tied to the fore swifture. All that we know is, that the first mate of the Gray says it was set in the rigging of the brig by one of the boys on board, who was ordered to do so by the second mate; and Wyckoff, one of her seamen, says the lantern was hung 20 feet 5 inches from the deck, and was made fast both at top and bottom, with its back to the fore swifture, and the two glasses exposed to the south, southeast, and southwest. But the boy who hung it there should have been made a witness by the libellants; for, having done it by order of his superior, the presumption is he could have given better testimony as to the manner in which it was done, than one whose duty it was not to do it, or observe how it was done, and who, without particular examination, could not have known the bearing of its glasses according to the compass, so minutely as he has described it. This may seem to others inexperienced in cases of collision, and in the administration of maritime law, a small matter,

but the responsibility imposed upon admiralty judges has caused them to look cautiously at the lesser as well as the larger incidents of every case.

And whenever a party to a libel, having the power to do so, does not produce a witness, or account for not having done so, who can presumptively give better testimony than that which has been given upon a point in the case, which it is the parties' interest to establish, judges in admiralty have rarely failed to remark upon the omission, and so allow it to have a bearing, according to the circumstances of the case, upon the testimony which has been given upon that point. The effect of this omission in connection with the other evidence, concerning the position of the lantern on board of the James Gray, make it very doubtful whether the lantern gave a steady light in the direction in which vessels coming into the harbor were obliged to approach it. I do not say that the causes suggested to account for the conflict of testimony between the witnesses will be satisfactory to every one, but that they are sufficient, according to maritime law, to warrant the conclusions drawn from them.

This conflict of testimony is not one to be decided by a plurality of witnesses, called on the one side or the other, nor can the rule of positive and negative testimony settle it; for the real question is, not only whether there was a light on board of the James Gray, but whether or not it was a sufficient light, such as the law enjoins, and so placed as to have been a signal light to all vessels approaching it, at all times of the tide and its changes, and during the vessel's swing upon the turn of it. A globe lantern, properly hung, which radiates to all points of the compass, will do that—a bowsprit lantern, with one opaque side, never can. The latter was the light on board of the James Gray.

The fact is, the collision was inevitable from the condition and place in which the ship was when the steamer cast her off. Her captain, pilot, and crew, did all that could be done by vigilance and seamanship to prevent it, and if they were not successful, they were not in fault. Nor can it be said that the ship incurred any liability for the collision on account of any blame which may be attributed to the steamer for casting her off when she did. It was done against the will of Capt. Herbest, nor did he know it had been done until he was told by the pilot of the steamer. But it was done when it might lawfully be done, and it has not been proved by the libellants that it was carelessly done. It is true, that the collision between the John Fraser and the James Gray was the consequence of it, but I know of no law which makes a sailing vessel when being towed by a steamer, either astern or by her side, responsible for a collision which the vessel could not do anything to prevent, and did nothing to occasion. No such law maritime has been established by any course of decisions, or by any

particular decision of any court which has had the favor of the profession that I am aware of, since the towage of vessels by steamers began. The towage service is not one of master and servant, or of principal and agent. There are no analogies to such relations between them. The profession has been much embarrassed by the attempts to make them, and to make them override the higher and different relations of a marine service.

Towage of vessels by steamers is an undertaking by the parties to it for a particular service, in which it is understood that each will do, under the direction and control of the steamer, all that is necessary for the accomplishment of the object, and neither is answerable for injuries done to third persons by the faults of the other. (14 Pickering.)

In this case, the ordinance and port regulations of the city were wilfully disobeyed; though informed what they were by the officer, whose duty it was to enforce them, Captain Plummer persisted in his fault. It is to be regretted that the assistant harbor master should then have had too much other business to do his duty. Had it been done, the collision would not have happened. Besides other transgressions of the law by Captain Plummer, he persevered in keeping the James Gray at single anchor, and did not moor her as he should have done. Though it does not appear that this omission of duty contributed in any way to the collision, it was very properly brought to the notice of the court by counsel in the argument, and has its weight in the estimate to be formed of Captain Plummer's neglect. Nor can I forbear noticing his absence from his vessel when the collision happened. His errand on shore was very untimely, and it may well be inferred that his officers, who were left in charge of the James Gray, had not a proper sense of discipline and duty, as they did not send a boat ashore for him before it was dark, as he says he ordered them to do. The James Gray had not then her complement of men; five were wanting, and all on board seem to have been very incompetent for the occasion, for they did nothing to avoid the peril of their vessel, but to cry out to the ship to keep clear. A small turn of the brig's helm, or paying out her cable, might have prevented the collision. There was no danger to be encountered in doing the first, and the objection that paying out the cable would have been perilous, can never find favor with this court. Had Captain Plummer been on board, his superior skill might have suggested both to him; and it is to be hoped that he would not have been deterred from letting out his cable to save his vessel and her owners, on account of any risk there may have been in doing it. A part of the morality of life is to hazard danger when duty calls upon us to encounter it. The seamen of our commercial marine have not been backward upon such occasions. There have, however, of late years, been instances where, in peril, they have not extended any part of their care of

themselves to others under their protection who should have shared it. I am not inclined to countenance the idea that any danger, whatever it may be, can excuse them from facing it, because it may involve personal risk.

With the views which I have expressed upon the merits of this case, and the law applicable to it, it only remains for me to direct a decree to be entered, affirming that of the district court in respect to the steamer General Clinch, and for reversing that part of it making the John Fraser responsible for the losses sustained by the James Gray from the collision between them.

Decree.

BRIG JAMES GRAY
vs.
SHIP JOHN FRAZER.

BRIG JAMES GRAY
vs.
STEAMER GEN'L CLINCH.

The two causes coming on, by consent, to be heard together, on appeal from the district court decree sustaining the libellant's claim for relief against the ship, and dismissing the claim against the steamer Clinch, on consideration of the evidence and pleadings in the district court, and additional evidence in this court taken, and deliberation had thereon, it is ordered and adjudged, that so much of the decree as condemns the ship John Frazer in damages be reversed, and the judgment in favor of the steamer confirmed, and that the libel be dismissed, and libellants pay costs.

JAMES M. WAYNE,
Associate Justice Sup. Court U. States.

Appeal Bond.

UNITED STATES OF AMERICA,
South Carolina District.

Know all men by these presents, that we, William Cushing, John N. Cushing, Caleb Cushing, and D. C. Seixas, are held and firmly bound unto John Frazer and Company, and Alexander Robertson and Preston West, executors of John Magee, in the full and just sum of three thousand dollars, lawful money of the said United States, to be paid to the said John Frazer and Company, and Alexander Robertson and Preston West, executors as aforesaid, or their attorneys, executors, administrators and assigns; to which payment, well and truly to be made and done, we bind ourselves, and

each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the twelfth day of June, in the year of our Lord one thousand eight hundred and fifty-seven, and the eighty-first year of the sovereignty and independence of the United States.

Whereas the above bounden William Cushing, John N. Cushing and Caleb Cushing have appealed to the Supreme Court of the United States from a decree of the U. S. circuit court for South Carolina district, bearing date the first day of June, A. D. one thousand eight hundred and fifty-seven, in a cause in which the said William Cushing, John N. Cushing and Caleb Cushing were libellants, and the said John Frazer & Co., claimants of the ship John Frazer, and Alexander Robertson and Preston West, executors aforesaid, claimants of the steamer Gen'l Clinch, were respondents:

Now, the condition of this obligation is such, that, if the above named appellants, William Cushing, John N. Cushing and Caleb Cushing, shall prosecute their appeal to effect, and answer and pay all such costs and expenses as shall be adjudged and decreed by the said Supreme Court against them, as such appellants therein, if they fail to make their plea good, and in all respects conform to and abide by such order or orders as may be made in the premises, then and in such case this obligation to be void, or else to be and remain in full force and virtue.

WILLIAM CUSHING, [L. S.]
JOHN N. CUSHING. [L. S.]
CALEB CUSHING, [L. S.]
P'r Att'y, D. C. SEIXAS.
D. C. SIEXAS. [L. S.]

Taken and acknowledged before me.

H. Y. GRAY,
Cl'k U. S. Courts S. C. D.

Clerk's Certificate.

I, Henry Y. Gray, clerk of the U. S. circuit court for South Carolina district, do hereby certify that the foregoing is a full, true and complete transcript of the records, evidence and proceedings had in the district and circuit courts for said district in the above mentioned causes, herewith transmitted to the Supreme Court of the United States, in pursuance of the petitions of appeal hereunto annexed.

In testimony whereof, I have hereunto set my hand and the seal of said circuit court, at office in Charleston, this twenty-sixth day of June, A. D. one thousand eight hundred and fifty-seven.

[SEAL.]

H. Y. GRAY, *Clerk.*

Petition of Appeal.

UNITED STATES OF AMERICA,
Sixth Circuit, South Carolina District.

In Admiralty.

WM. CUSHING, JOHN N. CUSHING, and CALEB CUSHING, owners of Brig Jas. Gray, &c.,
vs.
SHIP JOHN FRASER, &c.

&

WM. CUSHING, JOHN N. CUSHING, and CALEB CUSHING, owners of Brig Jas. Gray, &c.,
vs.
STEAMER GENERAL CLINCH, &c.

To the Supreme Court of the United States.

The petition of the above named appellants, Wm. Cushing, John N. Cushing, and Caleb Cushing, respectfully shows that a decree was lately made in the circuit court of the United States for the district of South Carolina, bearing date the first day of June instant, in a certain cause of admiralty and maritime jurisdiction pending in the said court, wherein the above named appellants were libellants, and the ship John Fraser and steamer Gen'l Clinch, their tackle, apparel and furniture, were defendants, in and by which decree it was "ordered and adjudged that so much of the decree (of the district court) as condemns the ship John Fraser in damages be reversed, and the judgment in favor of the steamer be confirmed, and that the libel be dismissed, and libellants pay the costs;" which said decree of the said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants respectfully pray that the said decree may be reversed, and that such other decree may be made by this court as shall be agreeable to equity and good conscience, and that these appellants may be restored to all things which they have lost by the said decree.

And these appellants, as in duty, will ever pray.

Dated this ninth day of June, 1857.

MEMMINGER, JERVEY & WILKINSON,
Proctors for Appellants.

Filed 9th June, 1857.